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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: February 16, 2000
Final briefs submitted: July 28, 2000
Decided: January 3, 2002)

Docket No. 99-6238

PAULINE DAVIS, CYNTHIA WILLIAMS, CORNELIA SIMMONS, and KIM RIVERA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

—v.—

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Appellant.

Before:

WALKER, *Chief Judge*,
KEARSE and POOLER, *Circuit Judges*.

Appeal from an order of the United States District Court for the Southern District of New York, Robert W. Sweet, *Judge*, permanently enjoining defendant Housing Authority from altering operations under a consent decree, entered to remedy racial discrimination in acceptance of tenants for public housing, by implementing a working-family preference at 20 housing projects.

Affirmed in part, reversed in part.

Chief Judge Walker dissents, in a separate opinion.

SCOTT A. ROSENBERG, New York, New York (Helaine Barnett, The Legal Aid Society, Civil Division, Civil Appeals & Law Reform Unit, New York, New York, on the brief), *for Plaintiffs-Appellees*.

HENRY SCHOENFELD, New York, New York (Jeffrey Schanback, General Counsel, Nancy M. Harnett, Stephen W. Goodman, Steven J. Rappaport, on the brief), *for Defendant-Appellant*.

KEARSE, *Circuit Judge*:

This case returns to us following remands in 1999 and 2000 to the United States District Court for the Southern District of New York, Robert W. Sweet, *Judge*, for further findings, clarification, and supplementation of the record in connection with its issuance of injunctions prohibiting defendant New York City Housing Authority ("NYCHA" or the "Authority") from implementing proposed changes in its method of complying with a 1992 consent decree (the "Consent Decree" or "Decree") set-

tling actions alleging that, in accepting tenants for public housing in New York City, the Authority had discriminated against Latinos and African-Americans on the basis of race. The district court found that NYCHA's proposed introduction of a working-family preference into the tenant acceptance procedures would cause a significant perpetuation of past segregation at 20 NYCHA low-income housing projects, and in 1999 it permanently enjoined NYCHA from implementing that preference at those projects. NYCHA appeals, contending principally that the district court erred (a) in its view of what constitutes segregation, and (b) in finding that segregation would be significantly perpetuated. For the reasons that follow, we affirm with respect to 14 of the housing projects, and we reverse with respect to the remaining six.

I. BACKGROUND

The factual background of this litigation has been chronicled in several opinions, familiarity with which is assumed. The prior proceedings are summarized below.

A. *The Consent Decree (*Davis I*)*

NYCHA, an independent public corporation created by New York State Law, operates 322 public housing projects in New York City. In the early 1990s, parallel actions were brought by the United States and by plaintiffs Pauline Davis *et al.* on behalf of themselves and others similarly situated, alleging that NYCHA had engaged in discrimination in violation of, *inter alia*, 42 U.S.C. §§ 1981, 1982, and 1983 and the Fair Housing Act of 1968, as amended, 42 U.S.C. § 3601 *et seq.* ("FHA"), by assigning applicants for public housing to particular housing projects on the basis of race. NYCHA ultimately acknowledged that it had engaged in, *inter*

alia, "racial steering" (NYCHA Memorandum of Law in Support of the Fairness and Adequacy of the *Davis* Settlement and the Entry of the Consent Decree and in Response to Comments Submitted by Interested Persons, dated October 30, 1992 ("NYCHA Memorandum Supporting Consent Decree" or "NYCHA Memorandum"), at 21), and it stated that "[t]he Housing Authority concluded that the complaint had merit" (*id.* at 22).

The parties agreed to settle both actions in 1992 by entering into the Consent Decree. *See Davis v. New York City Housing Authority*, 1992 WL 420923 (S.D.N.Y. Dec. 31, 1992) ("*Davis I*"). In urging the district court to enter the Decree, NYCHA admitted that

> [t]he Housing Authority engaged in a number of policies and practices that had the effect of discriminating against Black and Hispanic applicants. Because the Housing Authority was convinced that these policies were wrong, and indeed in most instances were stopped well before the lawsuits were brought, the Housing Authority believed that the responsible course was to settle these suits to remedy these past practices in as fair a manner as possible.

(NYCHA Memorandum at 21.) Describing "a few of these policies" (*id.*), the NYCHA Memorandum stated, *inter alia*, that the Authority in 1960 adopted an "integration program" whose "racial steering component . . . continued at a few predominantly white projects until January, 1988, resulting in a higher proportion of whites than would have resulted from a race neutral admissions policy" (*id.*), and that until 1990, some NYCHA "employees would expedite applications and send them to projects to which they would not otherwise have been sent[,] [o]ften . . . favor[ing] white appli-

cants who sought an apartment at a predominantly white project" (*id.* at 22).

Following a fairness hearing, then-District Judge Pierre N. Leval, to whom the case was then assigned, approved the Consent Decree, making findings of fact and conclusions of law that included the following:

> Plaintiffs' evidence supports their allegations that during specified periods of time the Housing Authority selected and assigned applicants for public housing, and tenants requesting transfers, to certain housing projects using methods that resulted in unlawful discrimination against Blacks and Hispanics. These methods included (1) the intermittent use of codes denoting housing projects to which only white families could be assigned; (2) the use of zip code and other geographic restrictions on admission to projects; (3) the use of racial goals or targets when new projects were "rented up" and on an ongoing basis thereafter; and (4) the assignment of families to projects where vacancies were not expected to arise.

Davis I, 1992 WL 420923, at *2. The Consent Decree

> permanently enjoined [NYCHA] from engaging in any act or practice which denies equal access to its housing . . . on the basis of race, color, or national origin, including[ ] adopting and implementing any tenant application, selection, assignment, and transfer plan, or any such policy or process, which gives preference to Applicants or tenants on the basis of race, color, or national origin.

Consent Decree ¶ 4(a). Other provisions permanently enjoined NYCHA from, *inter alia*, basing denials of transfers on racial considerations, *see id.* ¶ 4(b), making

statements indicating a preference or limitation based on race, *see id.* ¶ 4(c), and falsely representing, because of an applicant's race, that certain projects were not anticipating vacancies when in fact such vacancies were anticipated, *see id.* ¶ 4(d). Although parts of the Decree were to be dissolved $8^{1/2}$ years after its date of entry, the provision for such dissolution expressly excluded "the permanent injunctive provisions." *Id.* ¶ 50.

As part of the injunctive relief granted, the Consent Decree also required NYCHA to implement a new three-stage tenant selection and assignment plan ("TSAP") that substantially revised the Authority's prior procedures for granting applications for public housing. After explicitly incorporating the TSAP by reference, the Decree stated that "[t]he TSAP will be implemented by the Housing Authority to prevent any unlawful discrimination on the basis of race, color, or national origin, in compliance with the Housing Authority's obligations therewith under Title VI, the Fair Housing Act and the implementing regulations and requirements of" the United States Department of Housing and Urban Development ("HUD"). Consent Decree ¶ 5. HUD "approved the TSAP for a five-year period as meeting the requirements of," *inter alia*, HUD's "regulations governing non-discrimination on the basis of race, color, or national origin." Consent Decree page 5, ¶ WHEREAS.

In the TSAP, NYCHA recognizes "federal" preferences for certain categories of applicants, as required by certain federal laws, and employs certain of its own preferences ("local preferences"). In the first stage of the TSAP, applicants are chosen from the overall applicant pool for interviews as to their eligibility for public housing. In the second stage, those interviewed who are found eligible are assigned to waiting lists for vacancies and are divided into three "Tiers." Tier III families have

the highest incomes; Tier I families have the lowest. In the final stage of the TSAP, NYCHA attempts to allocate 25% of the vacancies to Tier III and to divide the remaining 75% evenly between Tiers I and II. Under the original TSAP's local preferences, priority is given to families on the basis of housing need.

The Decree also provided that

> [n]o Applicant will be barred or disqualified from any Project tenanted under the TSAP because of any minimum income requirements that result in discrimination on the basis of race, color, or national origin in violation of Title VI or the Fair Housing Act; provided, however, that consistent with HUD's general occupancy standards, the Housing Authority may seek to achieve a tenant body in each Project composed of families with a broad range of incomes, generally representative of the range of incomes and rent-paying abilities of lower income families in its geographic operating area to the extent permitted under 42 U.S.C. § 1437d(c)(4)(A)(iv), 24 C.F.R. § 960.205, and 24 C.F.R. Part 913. . . . If any new minimum income requirements are added to existing [conventional housing projects administered by NYCHA], plaintiffs shall have the right to challenge such a change during the five-year period [after full implementation of the TSAP] or thereafter. . . .

Consent Decree ¶ 8.

NYCHA was required to have the TSAP fully implemented within one year after entry of the Decree. *See id.* ¶ 6(a). If, during the five-year period after full implementation of the TSAP, NYCHA proposed to modify any provision of the TSAP, it was to give at least 60 days' notice to plaintiffs, who were given "the right . . . to

move the court to enjoin the proposed modification as inconsistent with the terms of th[e] Consent Decree." *Id.* ¶ 6(b). The Decree also provided that for three years following that five-year period, plaintiffs were allowed to ask the district court to "modify or otherwise enjoin any aspect of any TSAP implemented by the Housing Authority on the ground that it violates the Fair Housing Act, Title VI and/or HUD implementing regulations." *Id.* ¶ 6(c).

B. *NYCHA's Proposed Working-Family Preference (*Davis II-IV*)*

In 1995, NYCHA sought to modify the local preferences recognized under the TSAP. To the extent material here, it proposed to introduce a working-family preference ("WFP"), altering the factors determining whether an applicant for public housing is even granted an interview. Under the WFP, federal preference holders who are working or disabled would receive a priority over those who are not; as to local preferences, Tier III families and Tier II families would receive priority, in that order; thereafter, Tier I applicants who are working or are disabled would be given priority, but other Tier I applicants would have no priority. *See Davis v. New York City Housing Authority*, 1997 WL 407250, at *4 (S.D.N.Y. July 18, 1997) ("*Davis II*"). The proposed WFP would eliminate applicant housing need as a local priority concern and instead give preference to families who can pay the most. NYCHA's goals in proposing this change are to increase the number of working families in public housing and increase income integration in public housing, in order to promote financial and social stability in such housing. *See id.* at *14.

Plaintiffs opposed NYCHA's proposed changes and moved before Judge Sweet, to whom the case had been

reassigned, for an injunction. While conceding that NYCHA's interest in financial stability was legitimate, plaintiffs contended, supported by affidavits from their expert Dr. Leonard Cupingood, that the WFP would favor the admission of white families and thereby have the effect of perpetuating racial segregation. Plaintiffs suggested that the WFP be modified so that, while continuing to give the lowest preference to Tier I (*i.e.*, lowest-income) families, NYCHA would give all Tier I applicants equal preference. Under plaintiffs' proposed alternative, Tier I families would continue to rank below Tier II and Tier III families; and thus, because Tier II and III families by definition have higher incomes than Tier I families, the number of rentals to higher-income families would still increase; but desegregation of the housing projects would be less adversely affected. NYCHA conceded that plaintiffs' suggested alternative might increase income integration but rejected it, stating that it would frustrate the goal of increasing the proportion of rentals to working families. *See Davis II*, 1997 WL 407250, at *15.

The district court noted the legitimacy of NYCHA's concerns and goals and stated that there was no dispute that an increase in the proportion of tenants with higher incomes was needed in order to safeguard the projects' stability:

> Historically, public housing applicants in the lowest income categories accounted for approximately 1/3 of all NYCHA rentals. Since 1990, however, an increase in homeless families applying for housing has resulted in a significant increase in the number of rentals to the lowest income applicants. By 1995, these lowest income applicants accounted for 77.6% of new admissions. NYCHA states, and plaintiffs do not dispute, that unless a higher proportion of appli-

> cants with higher incomes receive rentals, the stability of the projects will be jeopardized.

Id. at *4. The court also noted that NYCHA had submitted its proposed WFP, along with another proposed modification called "Project Choice," to HUD for approval. Although HUD approved Project Choice as " 'not likely to affect the racial identifiability of developments in New York City,' " *Davis II*, 1997 WL 407250, at *5 (quoting HUD letter to NYCHA dated October 24, 1996), HUD's response to the proposed WFP, in contrast, was as follows:

> "HUD does not approve local preferences, and thus NYCHA may create these local preferences, so long as notice and comment requirements are met. *However, NYCHA should be mindful of the injunctive relief provided for by the Davis consent decree and its responsibilities under civil rights statutes.*"

Davis II, 1997 WL 407250, at *5 (quoting HUD letter to NYCHA dated July 31, 1996) (emphasis ours).

The district court proceeded to consider the likely effects of the WFP on NYCHA's performance of its obligations under the Decree. Noting that in 1995, under the TSAP's scheme of priorities, only some 15% of all applicants for public housing even reached the stage of being granted interviews, *see Davis II*, 1997 WL 407250, at *3, the court found that implementation of the WFP would significantly change

> the racial composition of the top 15% of applicants, who are those likely to be called for interviews. Under the current TSAP, only 7.2% of the top 15% of applicants are white. If the new Working Family Preference were implemented, there would be a statistically significant increase in the percentage of

> white families in the top 15% of the list of applicants. These conclusions are not disputed by NYCHA.

Id. at *5. The court noted further that Dr. Cupingood had concluded that if the WFP were implemented at the 11 projects that as of June 1996 remained more than 50% white, the process of desegregation would be significantly slowed at three of the projects, completely stopped at four projects, and indeed reversed at four projects. *See id.*

The court noted, however, that the WFP's desegregative effects could easily be lessened:

> It also appears that *NYCHA could eliminate the objectionable perpetuation of discrimination* by making revisions to their plan that are even less drastic than those proposed by plaintiffs. The Working Family Preference could be instituted in essentially the proposed form, *provided white applicants selected under the preference are not placed in projects in which whites are over-represented relative to the applicant pool.* The extent to which such a modification would be administratively feasible or desirable is, of course, a question for NYCHA.

Id. at *15 (emphases added).

Accepting the projections made by Dr. Cupingood, the district court found that plaintiffs were likely to succeed on the merits of their WFP challenge with respect to the housing projects whose tenant populations remained predominantly white. The court entered a preliminary injunction prohibiting implementation of the WFP at all 322 NYCHA projects, but it invited NYCHA to offer suggestions for modifications that would limit the injunction to the disproportionately white projects. *See id.* at *18.

Thereafter, the parties "agree[d] that the WFP considered in *Davis* [*II*] w[ould] not perpetuate past discrimination at any of the NYCHA projects other than the 21 projects where greater than 30% of the apartments are rented to whites (the 'Disproportionate Projects')," *Davis v. New York City Housing Authority*, 1997 WL 711360, at *4 (S.D.N.Y. Nov. 13, 1997, as amended Nov. 20, 1997) ("*Davis III*"), and "agree[d] that the WFP should go forward for the non-Disproportionate Projects," *id.* at *5. Accordingly, in *Davis III*, the court narrowed its prior order and enjoined use of the WFP at only those 21 housing projects where white families then occupied more than 30% of the apartments.

NYCHA appealed. This Court was unable to resolve the merits of the appeal, however, as we concluded that the district court had not provided an adequate explanation for finding that plaintiffs would likely succeed in showing that the WFP would perpetuate segregation at the projects to which the injunction applied. *See Davis v. New York City Housing Authority*, 166 F.3d 432, 437 (2d Cir. 1999) ("*Davis IV*"). We stated that although the opinions in *Davis II* and *Davis III* were

> not entirely devoid of detail, Judge Sweet failed to adequately explain the subsidiary facts and methodology underlying the ultimate finding. For instance, Judge Sweet refers to "existing trends demonstrat[ing] that many of the[ ] additional white families [admitted under the proposed modification] will be concentrated in predominantly white developments," but does not discuss or attempt to explain these trends or the data reflecting them. He also fails to address the time period during which the purported impact of the proposed TSAP was assessed and/or how future "trends" might affect application of the TSAP to developments that are

> not currently, but subsequently become, predominantly white. Further, while he focuses on the racial imbalance the proposed TSAP will cause at specific developments within the NYCHA system, he does not identify them by name or state the number, fraction or percentage of additional white families who will be admitted to each of the 21 developments as a result of the proposed TSAP.

Davis IV, 166 F.3d at 436 (footnotes omitted). We also noted that Dr. Cupingood "d[id] not cite to any precise numerical data underlying his opinion." *Id.* at 437.

Accordingly, while leaving the preliminary injunction undisturbed, we remanded for the district court to address these matters, stating that "[t]he proper standard to be applied on remand is whether the proposed use of the working family preference will *significantly* perpetuate segregation at the relevant NYCHA developments." *Id.* at 438 (emphasis in original).

C. *The WFP as Significantly Perpetuating Segregation (*Davis V*)*

Following the remand in *Davis IV*, the district court conducted a hearing, received additional evidence and arguments, and addressed, both broadly and in considerable detail, (1) whether there is a basis on which to conclude that there is segregation to be dealt with under the Consent Decree, and (2) whether the WFP would significantly perpetuate segregation. In an opinion dated August 11, 1999, the court rendered a final decision, answering both questions in the affirmative and concluding that plaintiffs were entitled to a permanent injunction prohibiting NYCHA from implementing the WFP at 20 housing projects. *See Davis v. New York City*

Housing Authority, 60 F.Supp.2d 220 (S.D.N.Y. 1999) ("*Davis V*").

First, as to the existence of segregation, the court ruled that, for purposes of this litigation, it is appropriate to deem a project segregated if white families occupy more than 30% of its apartments. It pointed out that

> throughout this litigation projects have been deemed "disproportionate" or "predominantly white" if more than 30 percent of the parties residing there are white. *See, e.g., Davis II*, 1997 WL 407250 at *12.

Davis V, 60 F.Supp.2d at 231 (footnote omitted). The court noted that this benchmark was reflected in the TSAP, which was incorporated by reference into the Consent Decree. *See, e.g., id.* at 232 n.9 ("[T]he TSAP identifies housing projects that are 30 percent white as infected by past segregation."). The TSAP contains a "Borrowing Provision" that can be used by a housing project that has more vacancies than willing applicants. Such a project is allowed to "borrow[ ]" applications from another project, *id.* at 231; but " 'if the borrowing project's tenant body is more than 30% white, [the NYCHA decisionmaker] shall not select a project whose tenant body is also more than 30% white,' " *id.* at 232 (quoting TSAP at 29). The court pointed out that the 30% benchmark was

> not, as NYCHA urges, an arbitrary number, but a negotiated figure that implies that the parties and the Court believed that a project was disproportionately white if more than 30 percent of its families are white. . . . An examination of Exhibit A to the Consent Decree, a list of projects where it was alleged that discriminatory practices occurred in statistically significant amounts, reveals that during

> the time in question most of these projects were at least 30 percent white.

Davis V, 60 F.Supp.2d at 232. Further, the court noted that the injunctive relief ordered was necessarily premised on a finding that a white tenant population above the 30% level constituted segregation:

> The TSAP must be read as in harmony with existing law. . . . Under existing law, borrowing of applications could not have been prohibited at projects more than 30 percent white (without regard for claimant relief) unless those projects were still tainted by past segregation. . . . [R]emedies containing race-conscious relief "must be substantially related to the objective of eliminating the alleged instance of discrimination, . . . and must not unnecessarily trammel the interests of affected third parties." *Kirkland v. New York State Dept. of Correctional Serv.*, 711 F.2d 1117, 1132 (2d Cir. 1983). Thus, had there been no finding that housing projects that are greater than 30 percent white were affected by past segregation, the Borrowing Provision would be unlawful.

Davis V, 60 F.Supp.2d at 232. Accordingly, having previously "held that '[u]nder the TSAP, a project is considered disproportionately white if more than 30 percent of its families are white,' " the court concluded that "30 percent will continue to be employed as a measure to identify segregation in this case." *Davis V*, 60 F.Supp.2d at 232 (quoting *Davis II*, 1997 WL 407250 at *12).

Second, as to the impacts of the WFP on the desegregation of the disproportionately white projects, the district court, largely crediting the analysis of Dr. Cupingood, made extensive findings. The court noted that, in predicting the effects of the WFP on the racial

mix of those likely to move into public housing projects ("move-ins"), Dr. Cupingood relied on data for the period 1991-1994 because 1991 is "the first year that is free of distortion caused by NYCHA's own discrimination," and 1994 is the "last year that is free of distortion [caused] by" the initial implementation of the Consent Decree remedies, to wit, the "Davis move-ins." *Davis V*, 60 F.Supp.2d at 226. Dr. Cupingood relied on NYCHA's records of move-ins and move-outs by race for each project, and he proceeded on the assumption that families of each race will make decisions about which projects to choose in the same manner, and with the same probabilities, as families of that race have done in the past. The court concluded that "[w]hile projections about the future, are by definition, subject to some uncertainty, Dr. Cupingood has taken reasonable steps, such as the use of historical averages, to minimize the impact of possible uncertainties." *Id.* at 239 n.17.

The court credited Dr. Cupingood's view that the WFP would have significant impacts on the disproportionately white projects, either by increasing the percentage of a project's white population or by detrimentally affecting the degree or timing of the project's desegregation. The *Davis V* opinion included tables showing, for each disproportionately white project, *inter alia*, "Race Distribution of 1995 Rentals Under Original TSAP and WFP" (Table 1); "Effect of WFP at Disproportionate Projects After Five Years Assuming Historical [T]urnover by Race" (Table 3); "Relative Percentage Reduction in Number of White Families [D]ue to WFP After Five [Y]ears Assuming Historical Turnover by Race" (Table 4); "Change in Percentage White Occupancy At Disproportionate Projects After Five Years Assuming Historical Turnover by Race" (Table 5); "Effect of WFP at Disproportionate Projects After Five Years Assuming

Historical Turnover by Race" (Table 7), and "[same] After Ten Years" (Table 6). *See Davis V*, 60 F.Supp.2d at 225-31.

In discussing the anticipated percentages of apartments that would be occupied by white families at each Disproportionate Project after five years, with and without the WFP, the court noted that,

> [a]ssuming historical turnover by race, after five years under the WFP, the percentage of white families at Middletown Plaza would rise from 51.85 to 60.1% (instead of falling to 49.4%). At the remaining Disproportionate Projects, white occupancy percentages would either stabilize or fall more slowly under the WFP than under the original TSAP. For example, at Cassidy-Lafayette, after five years the percentage of white families in occupancy would inch down from 53.6% to 50.4% (instead of falling to 42.4%).

Id. at 228-29. These figures were reflected in Table 5:

Table 5
Change in Percentage White Occupancy At Disproportionate Projects After Five Years Assuming Historical Turnover by Race

Project Name	**Initial**	***5 Years after Davis Move-Ins***	
	% White	**Original TSAP**	**WFP**
Bay View	34.5%	22.9%	24.7%
Berry	56.2%	45.0%	50.4%
Cassidy-Lafayette	53.6%	42.4%	50.4%
Forest Hills	51.7%	41.3%	44.4%
Glenwood	30.0%	18.1%	18.9%
Haber	53.0%	39.6%	46.4%
Holmes Towers	26.6%	18.6%	21.8%

Project Name	Initial % White	*5 Years after Davis Move-Ins* Original TSAP	WFP
Independence	9% [*sic*]	63.9%	64.8%
Isaacs	33.1%	24.8%	27.9%
Middletown Plaza	51.8%	49.4%	60.1%
New Lane	73.0%	64.8%	71.1%
Nostrand	41.9%	30.0%	32.9%
Pelham Parkway	31.8%	22.1%	23.5%
Pomonok	41.5%	33.3%	36.5%
Robbins Plaza	53.4%	42.6%	52.0%
Sheepshead Bay	35.2%	24.0%	26.8%
South Beach	53.1%	41.6%	47.6%
Straus	28.5%	27.4% [*sic*]	20.9%
Taylor-Wythe	54.4%	51.0%	52.1%
Todt Hill	46.7%	35.7%	39.7%
Williams	61.6%	57.5%	58.2%

Davis V, 60 F.Supp.2d at 229; *see also id.* at 227, Table 3 (at Independence, 493 of 715 apartments were initially occupied by white families, a percentage of 68.95; at Straus, under the original TSAP five years after the Davis move-ins, white families would occupy 48 of 263 apartments, a percentage of 18.3); *id.* at 233, Table 8 (as of June 1998, before Davis move-ins, Holmes Towers and Straus were above the 30% level, at 30.6% and 30.4%, respectively). The court noted that Table 6 showed that

> [s]imilar trends exist after ten years, except that at Disproportionate Projects where desegregation would not essentially stop, the magnitude of the impact of the WFP would generally become larger. For example, at Middletown Plaza, where segregation would increase under the WFP, the white population would climb to 108 instead of falling to 81. At Berry Houses, where desegregation would be

> significantly slowed, the white population would fall to 231 instead of 186. In the aggregate, after ten years under the WFP (again assuming historical turnover by race), the Disproportionate Projects would be occupied by 722 more white families than would have resided in those projects in the absence of the WFP.

Davis V, 60 F.Supp.2d at 229.

NYCHA, proffering the views of its own expert Dr. David Peterson, argued that Dr. Cupingood's analysis was flawed because it was based on the assumption that, in the absence of the Consent Decree's injunction, the percentage of white families admitted to NYCHA's public housing in 1998 would have risen from 4.2% to 9.9%. The Authority contended that the percentage admitted would have risen only to 6.48%. However, the district court found that there were substantial flaws in Dr. Peterson's methodology:

> [I]n addition to a number of other errors, Dr. Peterson did not account for the fact that several thousand families who moved into NYCHA housing during 1998 were selected for interviews and/or certified to project waiting lists before the WFP went into operation. Because families selected under the old TSAP are still working their way through the "pipeline," the white admission rate in 1998 was significantly lower than would have occurred if all families had been selected for interviews and certified pursuant to the WFP. Moreover, Dr. Peterson['s] conclusion is based on an under-representation of 1998 move-ins. Significantly, even accepting Dr. Peterson's methodology, and adjusting only for the undercount of families to the 21 projects, one obtains a corrected figure of 8.53 percent white among families who

> were placed in 1998 and were "allegedly untainted by the Pipeline Effect" (Cupingood Sixth Aff. ¶ 9).

Davis V, 60 F.Supp.2d at 239 n.16. Accordingly, the court rejected Dr. Peterson's analysis and credited that of Dr. Cupingood.

The court also rejected NYCHA's contention "that so long as the white occupancy rates would decline under the WFP, regardless of the rate of decline, then the WFP cannot be said to perpetuate segregation." *Id.* at 238. The court noted that to " 'perpetuate' means to extend in time," *id.* (other internal quotation marks omitted), and that that is precisely the effect that the WFP will have. Although at the outset of housing discrimination litigation "the adverse impact of an applicant selection process . . . is determined by whether minority applicants are chosen at a rate lower than their proportional representation in the overall applicant pool," once remedies for segregation have been ordered and the defendant proposes to change its method of compliance "[t]he query . . . is not whether the [change] would have an adverse impact on minority applicants, but whether it will significantly perpetuate segregation." *Davis V*, 60 F.Supp.2d at 237 n.14 (emphasis omitted).

> Where a court-ordered plan intended to eradicate past segregation is in effect, and where, as here, a proposed change to the plan is alleged to perpetuate past segregation, the Supreme Court has compared the results under the proposed plan with those under the original, court-ordered plan.
>
> . . . .
>
> Accordingly, in evaluating whether the WFP significantly perpetuates segregation, the relevant comparison will be the desegregation that would be

> achieved under the original TSAP with the projected effect of the WFP.
>
> . . . .
>
> The relevant inquiry here is not whether desegregation will occur *eventually*, but whether the WFP will significantly delay desegregation at the Disproportionate Projects. *See Monroe v. Board of Commissioners*, 391 U.S. 450, 459 . . . (1968) ("if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable."); *Wright[v. Council of the City of Emporia*], 407 U.S. [451,] 460 . . . [(1972)] ("if the proposal would impede the dismantling of the dual system, then the district court . . . may enjoin it from being carried out").

Davis V, 60 F.Supp.2d at 237-38 (emphasis in original).

The district court concluded that the WFP would significantly impede desegregation at NYCHA's 20 disproportionately white projects, *see Davis V*, 60 F.Supp.2d at 231 n.7 (of the 21 projects covered by the preliminary injunction pursuant to *Davis III*, Glenwood was omitted because prior to June 1998 it had fallen "below the 30% threshold"). The court reached this conclusion because the WFP will "more than double white admission rates," and "because existing trends demonstrate that many of these additional white families will be concentrated in predominantly white developments." *Davis V*, 60 F.Supp.2d at 238-39 (internal quotation marks omitted). It found these effects to have both "[s]tatistical significance," which "measures whether a particular phenomenon is the cause of a specific set of effects," and "[l]egal significance," which "measures whether, assuming the phenomenon was the cause of

those effects, those effects have any legal import." *Id.* at 239. As to statistical significance, the court stated as follows:

> A standard tool for assessing statistical significance is the two-standard deviation test. The test is used to determine whether a deviation from the expected norm is small enough to be attributable to chance, or so large that random chance could not reasonably account for the outcome. "The greater the number of standard deviations, the less likely it is that chance is the cause of any difference between the expected and observed results." *Ottaviani* [*v. State Univ. at New Paltz*, 875 F.2d 365, 371 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990)]. Courts have frequently adopted a standard of two to three standard deviations as constituting statistical significance. See *Hazelwood School District v. United States*, 433 U.S. 299, 311 n. 17 . . . (1977) ("if the difference between the expected value and observed number is greater than two or three standard deviations, then the hypothesis that employees were hired without regard to race would be suspect."); *Castaneda v. Partida*, 430 U.S. 482, 496 n. 17 . . . (1977).

Davis V, 60 F.Supp.2d at 239 (footnote omitted). The court noted that, in terms of the total number of apartments affected by the WFP in the disproportionately white projects, the magnitude of the effects would be well in excess of two standard deviations:

> For the five year-period, and assuming historical turnover trends for each race, the WFP would result in a total of approximately 1,139 white move-ins at the Disproportionate Projects, as compared to only 625 without the WFP. The difference between these figures—some 514 excess white move-ins—repre-

> sents 15.39 standard deviation units and is highly significant.

Id. at 239-40 (footnote omitted). And over a period of "ten years, assuming historical turnover rates for each race, the WFP would increase white move-ins from 1,217 to approximately 2,240—an increase of 1,023 white move-ins. The difference represents 21.92 standard deviation units." *Id.* at 240 n.19. The court found that the magnitude would also be statistically significant when assessed in terms of individual projects:

> [A]fter five years, 18 of the 21 Disproportionate Projects would have statistically significant white move-in differential caused by the WFP. At the ten year mark, again using historical turnover rates for each race, 20 of the 21 Disproportionate Projects would have statistically significant reductions in desegregation. At Holmes Towers, for example, the WFP would result in approximately 75 white move-ins as opposed to 34 without the WFP, a disparity representing 4.3 standard deviation units. At Pomonok, there would be approximately 287 white move-ins with the WFP and 138 without the WFP in place, a difference constituting 8.21 standard deviation units.

Id. at 240.

Finally, as to the legal significance of the WFP's retardation of desegregation, the court noted that

> [w]hile . . . many of the cases cited by the parties involve larger discrepancies than in the instant case, "small" percentage-point differences can result in significant perpetuation of segregation. At the Pomonok project, for example, where the WFP would increase the white occupancy rate by 3.2 percentage points after five years, and 5.5 percentage

> points after ten years, (*see* Cupingood Third Aff. [Cupingood's] Tables 4 and 6), every percentage point increase in the white population means relinquishing 20 apartments to white families that would have gone to African-American and Hispanic families. At Pomonok alone, the WFP would deprive non-white families of 66 apartments after five years (*see id.* [Cupingood's] Table 5) and 114 apartments after ten years (*see id.* [Cupingood's] Table 7).
>
> . . . .
>
> These figures are significant in sheer magnitude. . . . Perhaps more importantly, they are significant to the families affected. To be sure, the WFP has numerous benefits, but with respect to the Disproportionate Projects, these are outweighed by its adverse effects. The WFP markedly inhibits the rate at which desegregation will occur, adversely affects the ratios at the Disproportionate Projects, and contravenes the purposes of the Consent Decree. In short, the WFP significantly perpetuates segregation.

Davis V, 60 F.Supp.2d at 240-41 (footnotes omitted).

Accordingly, having determined that the effects of the WFP in slowing the pace of desegregation at the disproportionately white projects would be significant, the court enjoined NYCHA from implementing the WFP at the 20 relevant developments, making its preliminary injunction permanent.

D. *Comparisons of the TSAP With and Without the WFP (*Davis VI-VII*)*

NYCHA again appealed. This Court again remanded without resolving the merits, asking for additional information. *See Davis v. New York City Housing Authority*, 2000 WL 232191 (2d Cir. Feb. 23, 2000) ("*Davis VI*").

Given that the WFP had been implemented in 1998 at some 302 projects, *i.e.*, all but the 20 projects covered by the injunction, we stated that we would benefit from knowing (1) whether and to what extent actual tenant move-outs correspond with projected move-outs, and whether and to what extent the actual numbers would alter the experts' conclusions; (2) at each of the 20 covered projects, how many months it is expected to take to achieve a white family occupancy rate below 30% with and without the WFP; and (3) whether figures presented in the *Davis V* tables based on Dr. Cupingood's estimate of a 9.9% white admissions rate under the WFP should be revised to reflect a rate of 8.53%, as it appeared Dr. Cupingood might have suggested in one affidavit, or a rate of 8.28% as NYCHA suggested.

In June 2000, the district court responded to the questions posed by *Davis VI*. As to our first question, the court found that the expert witnesses for both sides opined that the use of actual move-out rates for 1998 would not necessarily increase the accuracy of the white admissions rate projections. *See Davis v. New York City Housing Authority*, 103 F.Supp.2d 228, 229 (S.D.N.Y. 2000) ("*Davis VII*"). As to our last question, the court found that the reference in Dr. Cupingood's prior affidavit to a rate of 8.53% was the result of a copying error and that the intended reference was to a rate of 8.28%. *Id.* at 231. However, the court found that Dr. Cupingood's rationale for using the rate of 9.9% for white move-ins rather than a rate of 8.28% was more persuasive than that proffered by Dr. Peterson for the lower rate. *Id.* at 232. The court also found that use of the 8.28% rate would not show any significant decrease in the WFP's effects of delaying desegregation in the 20 projects. *Id.* "Thus, adoption of the 8.28% rate, and revision of the calculations, would not change this Court's

prior conclusion that implementation of the WFP at the Disproportionate Projects would result in a significant perpetuation of discrimination." *Id.*

As to our second question, requesting a comparison of the estimated times for desegregation under the TSAP with and without the WFP, the court set forth the following table:

Project	***Months to Reach 30% Without WFP***	***Months to Reach 30% With WFP***
Bay View	17	21
Berry	195	Will never reach 30%
Cassidy-Lafayette	195	Will never reach 30%
Forest Hills	149	246
Haber	146	Will never reach 30%
Holmes Towers	Already below 30%*	Already below 30%*
Independence	620	899
Isaacs	18	29
Middletown Plaza	Will never reach 30%	Will never reach 30%
New Lane	Will never reach 30%	Will never reach 30%
Nostrand	57	85
Pelham Parkway	6	8
Pomonok	84	171
Robbins Plaza	355	Will never reach 30%
Sheepshead Bay	23	35
South Beach	163	Will never reach 30%
Straus	Already below 30%*	Already below 30%*
Taylor St./ Wythe Ave.	649	1323
Todt Hill	103	198
Williams	707	1066

*After Davis Move-Ins.

Id. at 231.

Following these findings, the appeal by NYCHA was reinstated.

II. DISCUSSION

On appeal, NYCHA contends principally (1) that neither the Consent Decree nor the TSAP defined housing projects with more than 30% white tenant populations as segregated, and that the district court therefore erred in using that standard in finding the 20 projects in question to be segregated; (2) that the district court erred in its findings as to the WFP's desegregation delays because the court (a) accepted the view of Dr. Cupingood rather than that of Dr. Peterson, (b) failed to do a project-by-project analysis, and (c) analyzed the "wrong comparables"; and (3) that the court erred in concluding that the differences in white tenancy percentages with and without the WFP are legally significant. For the reasons that follow, we reject most of NYCHA's contentions, finding merit only in its challenge to the ruling as to the legal significance of the WFP's effects at six projects.

A. *Standard of Review*

The standard of review is well established. In reviewing the district court's judgment and its issuance of a permanent injunction, we may overturn the court's findings of fact only if they are clearly erroneous. *See* Fed. R. Civ. P. 52(a).

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from [Supreme Court] cases. The foremost of these principles . . . is that "[a] finding

> is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342 (1949); *see also Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982).

Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985); *see also id.* at 577 (the question is not whether a contrary finding by the court of appeals would be clearly erroneous, but only whether the finding made by the district court was clearly erroneous). These standards apply whether the district court's findings are based on oral

testimony or solely on documentary evidence. *See*, *e.g.*, *id.* at 574; Fed. R. Civ. P. 52(a).

Determinations as to the existence and cause of racial discrimination are findings of fact, and hence are subject to the clearly-erroneous standard of review. *See*, *e.g.*, *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-90 (1982); *United States v. Yonkers Board of Education*, 837 F.2d 1181, 1218 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). We apply no different standard for the district court's findings as to the likely future discriminatory effects of actual or proposed conduct. Even as to past events, a trial judge

> cannot always be confident that he "knows" what happened. Often, he can only determine whether the plaintiff has succeeded in presenting an account of the facts that is more likely to be true than not.

Anderson v. Bessemer City, 470 U.S. at 580. Our task as an "appellate tribunal[ ] . . . is more limited still: we must determine whether the trial judge's conclusions are clearly erroneous." *Id.* at 580-81. We similarly review only for clear error the district court's findings as to whether particular conduct will more likely than not perpetuate discrimination.

The district court's conclusions as to questions of law, or as to mixed questions of fact and law, are reviewed *de novo*. *See*, *e.g.*, *St. Johnsbury Academy v. D.H.*, 240 F.3d 163, 168 (2d Cir. 2001); *United States v. City of Yonkers*, 197 F.3d 41, 49 (2d Cir. 1999), *cert. denied*, 529 U.S. 1130 (2000). A determination of the legal significance of the effects that the court has found likely to occur is a conclusion of law. The interpretation of a consent decree is also an issue of law that is freely reviewable by the court of appeals. *See*, *e.g.*, *United States v. O'Rourke*,

943 F.2d 180, 186 (2d Cir. 1991); *United States v. International Brotherhood of Teamsters*, 931 F.2d 177, 182-83 n.1 (2d Cir. 1991); *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985); *see also id.* at 1567-68 ("Consent decrees are a hybrid in the sense that they are . . . construed largely as contracts, but are enforced as orders.").

The propriety of relief in the form of a permanent injunction is reviewable for abuse of discretion. *See, e.g., Knox v. Salinas*, 193 F.3d 123, 128-29 (2d Cir. 1999) (per curiam); *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 278 (2d Cir. 1997), *cert. denied*, 524 U.S. 951 (1998); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994). And "though a court cannot randomly expand or contract the terms agreed upon in a consent decree, judicial discretion in flexing its supervisory and enforcement muscles is broad." *EEOC v. Local 580, International Association of Bridge, Structural & Ornamental Ironworkers*, 925 F.2d 588, 593 (2d Cir. 1991); *see also Berger v. Heckler*, 771 F.2d at 1568 (court's interest in protecting the integrity of a judicially approved consent decree "justifies any reasonable action taken by the court to secure compliance" (internal quotes omitted)).

B. *The 30-Percent Level as the Measure of Segregation*

For several reasons, we reject NYCHA's contention that the district court erred in using the 30% white family population level as the standard for whether a NYCHA public housing project should be deemed segregated.

First, the district court drew the 30% figure directly from the Consent Decree and the litigation surrounding it. As set out in Part I.C. above, the TSAP's Borrowing Provision allows an undersubscribed public housing project to borrow applications from another project; but it

explicitly forbids an undersubscribed project whose tenant population is more than 30% white from borrowing applications from another project whose tenant population is also more than 30% white. Thus, the Consent Decree, which expressly incorporated the TSAP by reference, treated 30% as the significant level.

Second, the Decree identified 31 projects as "Affected Developments," *see* Consent Decree ¶ 1(b) & Exhibit A, and required NYCHA to give priority placement at those 31 projects to some 1,990 families who had been "adversely affected by discrimination since 1985," *Davis I*, 1992 WL 420923, at *2. When *Davis I* was entered, 24 of those 31 projects, or more than 77%, had white family populations in excess of 30% (with three of the remaining seven having white tenant populations of 29-29.9%). (*See* NYCHA Tenant Statistics by Race as of Dec. 31, 1992.) And those 24 projects constituted 80% of the 30 NYCHA projects whose white tenant populations exceeded 30%. (*Id.*) Thus, it was reasonable for the district court to use the 30% figure as a reflection of which projects the parties had agreed were infected by past segregation.

Third, although NYCHA contends that none of its projects should be considered "segregated" under the Consent Decree once NYCHA has provided the relief that the Decree ordered for individual applicants, that contention is belied by the Decree itself. The Decree (a) allowed plaintiffs, within the first five years of the TSAP's operation, to seek an injunction against any proposal to modify the TSAP on the ground that the modification would be inconsistent with the Decree or with the FHA, and (b) allowed plaintiffs, within the three years following that five-year period, to request modification of the Decree on the ground that NYCHA's implementation of the TSAP was violating the FHA.

Accordingly, the existence of segregation in New York City public housing may properly be measured by FHA standards, not solely by whether NYCHA has provided the individualized relief ordered for specific victims of prior discriminatory practices.

Fourth, when *Davis V* was decided, NYCHA data showed that, overall, white families in NYCHA housing projects constituted just 7.0% of the tenant population. (NYCHA Research and Policy Development Special Tabulation of Tenant Characteristics as of Jan. 1, 1999 ("NYCHA 1999 Tenant Characteristics Tabulation"), at 1). Thus, in using the 30% level as the pertinent measure of segregation, the court generally considered a project to be segregated only if its white population was at least 23 percentage points higher than the average white tenant population system-wide, or more than four times the system-wide average.

The court's treatment of such wide discrepancies as indicative of segregation was entirely consistent with existing law. In *United States v. Yonkers Board of Education*, for example, we upheld findings that housing in the city of Yonkers was segregated in 1980 where minorities constituted 40.4% of the residents of one quadrant of the city, but only 18.8% of the city's total population. *See* 837 F.2d at 1185, 1218; *see also id.* at 1185-86 (in five of the 10 real estate tracts within that quadrant, minorities constituted more than 50% of the residents). We concluded that there was no error in the district court's findings that the city's decision to concentrate low-income housing, occupied principally by minorities, in that quadrant had a discriminatory effect. *See id.* at 1219-20. *Cf. Brown v. Board of Education*, 892 F.2d 851, 870 & n.54 (10th Cir. 1989) (comparing minority enrollment in particular schools against system-wide figures and finding vestiges of segregation where

the difference in minority representation between the actual population and the student population exceeded 15 percentage points), *vacated*, 503 U.S 978 (1992), *reinstated in full*, 978 F.2d 585 (10th Cir. 1992), *and cert. denied*, 509 U.S. 903 (1993); *Penick v. Columbus Board of Education*, 583 F.2d 787, 799 (6th Cir. 1978) (same), *aff'd*, 443 U.S. 449 (1979).

NYCHA attempts to distinguish such authorities by pointing out that the present litigation was resolved without a trial on the merits and that the Consent Decree recited that NYCHA did not concede liability. This approach is unpersuasive. To establish a violation of the FHA, a plaintiff need not show discriminatory intent but need only prove that the challenged practice has a discriminatory effect. *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (per curiam); *United States v. Yonkers Board of Education*, 837 F.2d at 1217. The FHA prohibits such practices and authorizes courts to order "affirmative action to erase the effects of past segregation and desegregate housing patterns." *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1133 (2d Cir. 1973). Here, NYCHA's own records plainly show segregative housing patterns. In 1992, NYCHA operated more than 320 public housing projects. Some 62.66% of the white families (9,731 of 15,530) lived in the 31 projects that were defined in the Consent Decree as Affected Developments. (*See* NYCHA Tenant Statistics by Race as of Dec. 31, 1992.) In addition, there are four projects (Haber, Independence, Taylor-Wythe, and Williams) that were not defined as Affected Developments but are covered by the present injunction, whose respective white tenant populations at the end of 1992 ranged from 42% to 65% (*see* NYCHA Tenant Statistics by Race as of Dec. 31, 1992) and in 1998 ranged from

53% to 61.6%, *see Davis V*, 60 F.Supp.2d at 227, Table 3; *id.* at 229, Table 5. As of December 31, 1992, those four projects housed an additional 1,298 white families. (*See* NYCHA Tenant Statistics by Race as of Dec. 31, 1992.) Thus, when *Davis I* was decided, NYCHA had placed more than 71% of the white public-housing population in 35 of its 320-odd projects.

In approving the Consent Decree, the district court found that plaintiffs' evidence supported their allegations that NYCHA had selected, assigned, and transferred applicants for public housing to particular projects using methods that resulted in unlawful discrimination on the basis of race. *Davis I*, 1992 WL 420923, at *2. NYCHA did not appeal those findings. Nor could it legitimately have done so. In urging the district court to approve the Consent Decree, NYCHA stated that it had engaged in a number of practices, some dating back to 1960, and some lasting until 1990,-"that had the effect of discriminating against Black and Hispanic applicants." (NYCHA Memorandum Supporting Consent Decree at 21-22.) NYCHA stated that those policies included racial steering and favoring white applicants for predominantly white housing projects (*id.* at 22), that "these policies were wrong" (*id.* at 21), and that "[t]he Housing Authority concluded that the complaint had merit" (*id.* at 22). *See* Part I.A. above. Having made those statements to the court in order to secure judicial approval of the Decree, NYCHA cannot now disavow them.

In sum, only 7% of the families in NYCHA housing projects system-wide are white; the TSAP, incorporated into the Consent Decree, treated 30% white family occupancy as a threshold signifying segregation; when the Decree was entered, more than 62% of the white public-housing population lived in fewer than 10% of the NYCHA projects; and nearly all of the projects whose

tenant populations were more than 30% white were targeted by the Decree for placement of individual applicants who had been the victims of past discrimination. We see no clear error in the district court's finding that in negotiating and approving the Consent Decree, the parties and the court, respectively, had regarded projects more than 30% of whose apartments were rented to white families as segregated, nor any error in the court's use of the 30%-level as a reasonable standard.

C. *The District Court's Findings of Fact as to the WFP's Effects*

Nor do we see clear error in the district court's findings as to the likely percentages of white tenant populations in the 20 covered projects with and without the WFP. NYCHA attacks those findings principally by arguing that the court should have adopted the views presented by Dr. Peterson rather than those of Dr. Cupingood; that the court failed to conduct a project-by-project analysis; and that it erred in comparing the projected effects under the WFP to the projected effects under the original TSAP rather than to the then-current racial composition of the projects. We disagree.

As discussed in Part II.A. above, decisions as to which witness to credit and which of two permissible inferences to draw lie strictly within the province of the district court as factfinder. As discussed in Parts I.C. and D. above, the district court found that Dr. Cupingood had extrapolated data from a reasonable period—one that was free of distortion either by NYCHA's discriminatory practices or by the implementation of decretal remedies for those practices—and that his assumptions, "us[ing] historical averages, to minimize the impact of possible uncertainties," *Davis V*, 60 F.Supp.2d at 239 n.17, were reasonable. Further, in response to the remand in *Davis*

VI, both sides' experts agreed that use of actual turnover data for the available period would not change their views as to the likely effects of the WFP in the future. Although predictive analysis is generally more speculative than statistical analysis of existing data—which the district court recognized, *see*, *e.g.*, *Davis V*, 60 F.Supp.2d at 239 n.17 ("projections about the future, are by definition, subject to some uncertainty")—the need for predictions in this case, in order to determine the WFP's likely effects, was inescapable.

The district court found that Dr. Peterson's analysis was flawed in several respects. It is immaterial to appellate review whether the views proffered by Dr. Peterson were nonetheless permissible. The views proffered by Dr. Cupingood were permissible, and we thus see no basis on which to conclude that the court's acceptance of his analysis, rather than that of Dr. Peterson, is clearly erroneous.

NYCHA also contends that Dr. Cupingood's analysis is flawed because it would automatically produce statistical significance over time. We disagree because the present inquiry falls outside the realm in which ordinary statistical analysis, and the need for inquiry into significance from a purely statistical standpoint, are needed. Ordinarily, such an inquiry is used when observable data are compared against expected data, or when two sets of observations are compared, and the question is whether the differences between the two data sets are attributable to a factor other than chance. In the present case, there is no question as to what causes the differences between the projections of the pace of desegregation with and without the WFP: the differences are caused simply by the contrasting hypotheses.

Nor is there any merit in NYCHA's contention that the district court failed to analyze the likely effects of the

WFP on a project-by-project basis. Most of the district court's analyses were conducted at both the project level and the aggregate level. *See*, *e.g.*, *Davis V*, 60 F.Supp.2d at 240 ("Statistical significance can also be analyzed at the project level.") Although the court did not discuss every project in detail, its inclusion of the numerous tables in *Davis V* and *Davis VII*, showing the levels of white-family concentration at each project for various time periods, provides adequate assurance that each project was considered individually. Thus, while we disagree with some of the court's conclusions as to the legal significance of the WFP differential at certain of the projects, *see* Part II.D. below, we see no indication that the court failed to give each project individual attention.

Finally, the court did not err in comparing the anticipated desegregation effects under the WFP against the anticipated effects under the original TSAP rather than against the racial composition of the projects without the TSAP. The remedies implemented under the TSAP were designed to alleviate past racial discrimination. It was both consistent with Supreme Court cases, as the district court discussed in *Davis V*, 60 F.Supp.2d at 237, and eminently reasonable for the court to compare the effects of NYCHA's proposed changes against the anticipated status of the projects under the original TSAP.

D. *The Legal Significance of the WFP's Effects*

The matter of whether the differences in the pace of desegregation under the original TSAP and the TSAP as it would be modified by the WFP are legally significant is a question of law that we review *de novo*. The caselaw give us little guidance as to what constitutes legal significance. The district court focused primarily on the issue of desegregation and the differences between the existing and the proposed procedures in achieving deseg-

regation. In so doing, the court adopted the reasonable premise that past segregation may be perpetuated by actions that slow the pace of desegregation, even though they do not reverse it, *see, e.g., Arthur v. Nyquist*, 712 F.2d 816, 822 (2d Cir. 1983) (affirming suspension of hiring and layoff rules that delayed desegregation of public school faculty), *cert. denied*, 467 U.S. 1259 (1984); *Sarabia v. Toledo Police Patrolman's Ass'n*, 601 F.2d 914 (6th Cir. 1979) (affirming suspension of civil service rule that restrained growth in African-American representation on the police force). Were the court not to consider the effects of proposed conduct on the pace of desegregation, desegregation could be delayed to such an extent that it effectively would never be achieved. And were there no worthy countervailing considerations, the court's correct findings that proposed modifications would substantially delay desegregation would likely end our inquiry.

In the present case, however, NYCHA has proposed the WFP in pursuit of a valid countervailing interest that is, to some extent, in tension with the goal of expeditious desegregation and that is worthy of consideration. As discussed in Part I.B. above, NYCHA's goal in proposing a preference for working families is to increase the number of such families, increase income integration in public housing, and thereby promote financial and social stability in such housing. There can be no doubt that this is a legitimate objective. In providing federal funding for low-income housing, Congress has prohibited recipient public housing agencies from "concentrat[ing] very low-income families (or other families with relatively low incomes) in public housing dwelling units in certain public housing projects or certain buildings within projects," 42 U.S.C. § 1437n(a)(3)(A) (Supp. V 1999), and

has required such agencies to adopt plans for deconcentration:

> A public housing agency shall submit with its annual public housing agency plan . . . an admissions policy designed to provide for deconcentration of poverty and income-mixing by bringing higher income tenants into lower income projects and lower income tenants into higher income projects. This clause may not be construed to impose or require any specific income or racial quotas for any project or projects,

42 U.S.C. § 1437n(a)(3)(B)(i) (Supp. V 1999). *See also* 42 U.S.C. § 1437d(c)(4)(A)(iv) (1994) (which, at the time the WFP was proposed, provided that public housing authorities "to the maximum extent feasible, . . . will include families with a broad range of incomes and will avoid concentrations of low-income and deprived families with serious social problems"), *repealed*, Balanced Budget Downpayment Act, I, Pub. L. No. 104-99, § 402(d)(1), 110 Stat. 26, 41 (1996). As amended in 1998, § 1437n provides that "[a] public housing agency may establish and utilize income-mix criteria for the selection of residents for dwelling units in public housing projects, subject to the requirements of this section," 42 U.S.C. § 1437n(a)(1) (Supp. V 1999).

Consistent with these statutory provisions, HUD regulations explicitly permit a preference for "working families." *See* 24 C.F.R. § 960.205(a) (2001); 24 C.F.R. § 960.206(b)(2) (2001). In issuing § 960.205(a), HUD commented that "[t]he Department is convinced that housing agencies must have the flexibility to give preference to working families to assure diversity in the residency of projects and to include families who can serve

as role models for other families." 59 Fed. Reg. 36,618 (July 18, 1994).

Notwithstanding that conviction, HUD did not endorse NYCHA's proposed WFP. Nor, however, despite having responsibility under § 602 of Title VI of the Civil Rights Act of 1964 to review plans for federally funded public housing to ensure compliance with federal civil rights law, *see* 42 U.S.C. § 2000d-1 (1994), did HUD criticize the WFP. Rather, when NYCHA sought HUD's approval for the WFP and Project Choice, HUD's response with respect to the WFP—unlike its reaction to Project Choice, which HUD found " 'not likely to affect the racial identifiability of developments in New York City for the remaining period of the *Davis* TSAP,' " *Davis II*, 1997 WL 407250, at *5 (quoting HUD letter to NYCHA dated October 24, 1996)—was to remind NYCHA that it must give notice of the proposed WFP and that it must " 'be mindful of the injunctive relief provided for by the *Davis* consent decree and its responsibilities under civil rights statutes.' " *Davis II*, 1997 WL 407250, at *5 (quoting HUD letter to NYCHA dated July 31, 1996).

We too are mindful of NYCHA's responsibilities under the Decree and the civil rights laws, and we conclude that the assessment of whether the effects of the WFP are legally significant involves a balancing of the interest in eradicating the past effects of segregation against the interest in achieving financial stability in public housing. The latter is reflected in the public housing statutes discussed above. The district court acknowledged that interest, *see Davis II*, 1997 WL 407250, at *14, as well as the existence of cause for concern on the part of NYCHA, *see id.* at *4 (noting that the percentage of applications from families who are homeless or in the lowest income category had risen from approximately 33% to 77.6%). And plaintiffs did "not dispute, that

unless a higher proportion of applicants with higher incomes receive rentals, the stability of the [NYCHA] projects will be jeopardized." *Id.*

At the same time, we think it plain that Congress did not mean to cause public housing agencies to implement plans for financial deconcentration in a way that would violate the civil rights laws. And we take into account the fact that, in the present case, the concentration of most of the white families in a small percentage of the projects was the consequence of NYCHA policies and practices that—as acknowledged by NYCHA in urging judicial approval of the Consent Decree—included racial steering, withholding of information that could have led minority applicants to rent apartments in predominantly or disproportionately white projects, misrepresentations that deterred such integrated rentals, and favorable treatment for white applicants seeking housing in predominantly or disproportionately white projects. As a result, when the Decree was entered, NYCHA had placed more than 71% of its white families in 35 of its 320-odd projects. (*See* NYCHA Tenant Statistics by Race as of Dec. 31, 1992.) More than 51% of the white families (7,929 of 15,530) lived in the 20 projects that are at issue on this appeal (*see id.*); and that concentration level declined little after the implementation of the TSAP. As of January 1, 1999, there were a total of 12,185 white families residing in NYCHA projects (*see* NYCHA 1999 Tenant Characteristics Tabulation at 1), and 5771 of them lived in the 20 projects covered by the injunction (*see id.* at 25, 29, 59, 104, 119, 126, 133, 136, 177, 192, 193, 203, 207, 223, 236, 241, 251, 258, 262, 297). Thus, when the permanent injunction was entered, 20 of NYCHA's 322 housing projects (6.2%) still housed 47.36% of the white families.

Balancing all of the factors, we conclude that in the circumstances of this litigation, the district court determined correctly, with respect to most—although not all—of the 20 projects in question, that the desegregation delays that would be caused by implementation of the WFP are legally significant. In reaching this conclusion, we consider the delays not just in terms of percentages but also as real-time intervals. With that focus, which is somewhat broader than that of the district court, we see significant distinctions between certain categories of projects: There are two projects that were in effect desegregated prior to the entry of the permanent injunction, four projects at which the WFP is predicted to delay the achievement of desegregation by very small intervals of real time, several others at which desegregation will be delayed for a large number of years, still others that would otherwise eventually be desegregated but that will never reach the 30% level under the WFP, and two projects that will never reach the 30% level with or without the WFP.

The projects covered by the injunction, *see* Part I.D. above, and *Davis VII*, 103 F.Supp.2d at 231, are ranked below in order of the time it will take their white tenant populations to decline to the 30% level under the WFP, with the last column showing the differential between that time and the time each would need to reach that level without the WFP.

Project	***Months to Reach 30% Without WFP***	***Months to Reach 30% With WFP***	***Differential***
Holmes Towers	Already below 30	None	n/a
Straus	Already below 30	None	n/a

Project	*Months to Reach 30% Without WFP*	*Months to Reach 30% With WFP*	*Differential*
Pelham Parkway	6	8	2 months
Bay View	17	21	4 months
Isaacs	18	29	11 months
Sheepshead Bay	23	35	12 months
Nostrand	57	85	2.33 years
Pomonok	84	171	7.25 years
Todt Hill	103	198	7.92 years
Forest Hills	149	246	8.08 years
Independence	620	899	23.25 years
Williams	707	1066	29.92 years
Taylor/Wythe	649	1323	56.17 years
Haber	146	Will never reach 30%	
South Beach	163	Will never reach 30%	
Berry	195	Will never reach 30%	
Cassidy-Lafayette	195	Will never reach 30%	
Robbins Plaza	355	Will never reach 30%	
Middletown Plaza	Never 30%	Will never reach 30%	
New Lane	Never 30%	Will never reach 30%	

Although Holmes Towers and Straus, respectively, had white populations of 30.6% and 30.4% as of June 1998, *see Davis V*, 60 F.Supp.2d at 233, Table 8, they were, factoring in the Davis move-ins, at 26.6% and 28.5% respectively, by the time the injunction was made permanent, *see id.* at 229, Table 5; *Davis VII*, 103 F.Supp.2d at 231. There was no prediction that the white tenant populations in those two projects would rise above the 30% level as a result of the WFP. In *Davis III*, plaintiffs agreed that the WFP should not be enjoined at projects

whose white tenant population was not above 30%. *See* 1997 WL 711360, at *4-*5. More importantly, 30% has been used by the district court throughout as the measure of segregation. In the circumstances, we conclude that Holmes Towers and Straus should not have been deemed still segregated. The effects of the WFP in delaying further integration of those projects should not have been found legally significant, and implementation of the WFP at those projects should not have been enjoined.

At four projects, the desegregation delays caused by implementation of the WFP would range from two months to 12 months. The delays of two months and four months for Pelham Parkway and Bay View, respectively, are not legally significant but rather are *de minimis*. Nor do we view the delays of 11 and 12 months for Isaacs and Sheepshead Bay, respectively, as impermissibly long. Substantial strides in desegregating those projects have been made since entry of the Consent Decree, causing them to approach the 30% level. Thus, whereas on December 31, 1992, Isaacs and Sheepshead Bay, respectively, had white tenant populations of 52.9% and 54.1% (*see* NYCHA Tenant Statistics by Race as of Dec. 31, 1992), by January 1, 1999, their respective white tenant populations were 36.3% and 35.0% (*see* NYCHA 1999 Tenant Characteristics Tabulation at 136, 236). Given this history and the valid objective of financial stability, we conclude that the delays of 11 and 12 months at those two projects are not legally significant. In sum, we conclude that implementation of the WFP at Pelham Parkway, Bay View, Isaacs, and Sheepshead Bay should not be enjoined.

The WFP's effects at the 14 remaining projects, substantially delaying their desegregation, are legally significant. Although the law tolerates some "reasonable delay" in achieving desegregation, nearly a decade has

passed without these projects' nearing the 30% desegregation level. All of these 14 projects had white tenant populations substantially in excess of 30% when the Consent Decree was entered in 1992, and they still had white populations substantially in excess of 30% in 1999. Indeed, nine of them remain more than 50% white. The anticipated pace of desegregation under the original TSAP in most cases already provided for additional "reasonable" delay. For example, even without the WFP, the projected time remaining after 1999 for desegregation of the Pomonok and Todt Hill projects was some seven or eight years, *i.e.*, some 13-14 years after entry of the Decree. We regard NYCHA's proposed expanded delays, most ranging from more than seven years to eternity, as legally significant, and we see no abuse of discretion in the district court's permanent injunction against implementation of the desegregation-delaying WFP at these remaining projects.

We recognize that it is predicted that three projects (Independence, Williams, and Taylor/Wythe) even under the original TSAP would not be desegregated for more than a half-century. Those target dates are indeed distant. But the WFP's impact, delaying the ultimate desegregation of those projects for an additional 23-56 years, is a perpetuation of desegregation that we cannot deem insignificant. Further, though the anticipated dates of desegregation of five projects (South Beach, Berry, Cassidy-Lafayette, Robbins Plaza, and Haber) are also more than a decade away without the WFP, under the WFP desegregation would never be achieved. We cannot view such "delays" as not legally significant.

Lastly, at Middletown Plaza and New Lane, a reduction to the 30% level is not expected under either plan. Although the WFP thus would not prevent the actual desegregation of those projects, its implementation

would have legal significance, for it would impede or reverse the expected five-year decreases in white-family concentration. According to Table 5 in *Davis V*, 60 F.Supp.2d at 229, white family tenancy at New Lane would decrease from 73% to 64.8% without the WFP; but it would decline only to 71.1% with the WFP. And at Middletown Plaza, which is projected for only a modest decrease from 51.8% to 49.4% without the WFP, adoption of the WFP would actually increase the percentage of white families from 51.8% to 60.1%. Thus, though Middletown Plaza and New Lane would not reach desegregated levels even without the WFP, the degree of segregation would be significantly greater with the WFP.

In sum, we conclude that at those six projects where the WFP will not delay the reduction of the white tenant population to 30% either at all or by more than 12 months, the effects of the WFP are not legally significant. At the remaining 14 projects, the delays that would be caused by the WFP are legally significant, and implementation of the WFP at those projects was properly enjoined.

It is, of course, well established that a district court has the power, in the exercise of its discretion, to modify its past injunctive decrees in order to accommodate changed circumstances. *See, e.g., United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248-49, 251 (1968); *System Federation No. 91, Railway Employees' Department v. Wright*, 364 U.S. 642, 646-48 (1961); Fed. R. Civ. P. 60(b)(5). It remains open to NYCHA to move for a modification of the present injunction against implementation of the WFP at any of the remaining 14 projects in the event that the number of apartments rented to white families at such project declines to the 30% level.

CONCLUSION

We have considered all of NYCHA's contentions on this appeal and, except as indicated above, have found them to be without merit. The order of the district court is reversed to the extent that it enjoined NYCHA from implementing the WFP at the Bay View, Holmes Towers, Isaacs, Pelham Parkway, Sheepshead Bay, and Straus projects; in all other respects, the injunction is affirmed.

JOHN M. WALKER, JR., *Chief Judge, dissenting*:

I am concerned that the majority, in its effort to more rapidly rectify the past discriminatory practices of the New York City Housing Authority ("NYCHA"), has endorsed a questionable attempt at social engineering and, in doing so, has reached a decision that may well have the practical effect of making several of the housing projects in New York City worse. Although the majority acknowledges the importance of working families to the financial and social stability of public housing, its treatment of the working family preference ("WFP") leaves the impression that those interests must always yield to a desegregation remedy, however crafted. I disagree with any such implication, and with the majority's rejection of the position in favor of the WFP taken by the NYCHA.

As the agency charged with administering public housing, the NYCHA should generally be allowed to implement critical objectives such as the WFP even though it might slow the pace of desegregation somewhat. The NYCHA has acknowledged the wrongfulness of its past practices of segregation and is now working to promote desegregation. In my opinion, the WFP repre-

sents a good faith effort by the NYCHA to maintain the viability of public housing in New York City by striking a balance between rapid desegregation and the values promoted by social and financial stability. That such a balance needs to be struck cannot be doubted. As Congress found in the "Findings and Purposes" section of the Quality Housing and Work Responsibility Act of 1998, "the public housing system is plagued by a series of problems, including the concentration of very poor people in very poor neighborhoods and disincentives for economic self-sufficiency." Pub. L. No. 105-276, § 502(a)(3), 112 Stat. 2518, 2520. Congress further made the significant finding that the "*public interest[] will best be served by a reformed public housing program that*," among other things, "vests in public housing agencies that perform well the maximum feasible authority, discretion, and control with appropriate accountability . . . [and that] *rewards employment and economic self-sufficiency of public housing residents*." *Id.* § 502(a)(5)(C) & (D), 112 Stat. at 2521 (emphasis added).

The plaintiffs themselves have acknowledged the important values promoted by the WFP in the consent decree. The consent decree authorizes the NYCHA to "seek to achieve a tenant body in each Project composed of families with a broad range of incomes, generally representative of the range of incomes and rent-paying abilities of lower income families in its geographic operating area to the extent permitted under 42 U.S.C. § 1437d(c)(4)(A)(iv), 24 C.F.R. § 960.205, and 24 C.F.R. Part 913." (Majority Op. at 7 (quoting Consent Decree ¶ 8)). Section 1437d(c)(4)(A)(iv) in turn requires every contract for contribution to provide that the public housing agency will comply with requirements prescribed by the Secretary of Housing and Urban Development, including the selection of tenant criteria that "are

designed to ensure that, to the maximum extent feasible, the projects of an agency will include *families with a broad range of incomes and will avoid concentrations of low-income families and deprived families with serious social problems.*" 42 U.S.C. § 1437d(c)(4)(A)(iv) (1992) (emphasis added). Similarly, 24 C.F.R. § 960.205 mandates that tenant selection criteria "shall be reasonably related *to individual attributes and behavior of an applicant* and *shall not be related to those which may be imputed to a particular group or category of persons* of which an applicant may be a member." 24 C.F.R. § 960.205 (1992) (emphasis added).

Although we should never blindly defer to agency decisions, I do not think that the NYCHA's congressionally-authorized WFP should be enjoined without a project-by-project and in-depth examination of the relative importance of project stability and the other values promoted by the WFP, on the one hand, and the rate at which desegregation targets are met, on the other. The majority's adherence to the district court's talismanic number of 30% for whites is no substitute for such an examination. While the 30% figure was accepted by the NYCHA as an aspirational goal in the consent decree, that was long before it could have been known that the 30% figure would be a barrier to the implementation of the WFP. The 30% number seems to have been picked out of thin air. Why not 25% or 35% or 40%? Why not a different number for different projects? In my view, the 30% figure amounts to an arbitrary number that is being used to frustrate the considered policy of the NYCHA. Putting aside the counter-intuitive notion that permeates the district court's analysis, affirmed by the majority, that a project with more than 30% white-occupied apartments is "predominantly white" (Majority Op. at 13) and thus is segregated, it is clear that the color-blind WFP

would not perpetuate such "segregation" but, except for Middletown Plaza which is located in a largely white area, would reduce it, albeit more slowly than under the tenant selection and assignment plan ("TSAP"). Moreover, under the district court's and the majority's holdings, the 30% figure sheds its aspirational character and effectively becomes a quota which, should the NYCHA fail to meet it with sufficient dispatch, penalizes a housing project by denying to it the WFP.

In sum, the practical effect of the majority's decision is to deny housing to people who deserve it because of their hard work or other merit solely on the basis of their race or ancestry, to frustrate the worthwhile efforts of the NYCHA to reward and promote employment and economic self-sufficiency in its tenants, and to deny the existing tenants the obvious benefit of having working families as their neighbors. I am concerned that by overriding the NYCHA's policy decision for the sake of more rapid desegregation, the majority's decision could result in the deterioration of the New York City housing projects that remain under the injunction to the point where the achievement of its desegregation targets would be a Pyrrhic victory.

I respectfully dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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90 Civ. 628 (RWS)

PAULINE DAVIS, CYNTHIA WILLIAMS, CORNELIA SIMMONS, and KIM RIVERA, on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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92 Civ. 4873 (RWS)

UNITED STATES OF AMERICA,

Plaintiff,

—against—

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

APPEARANCES:

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OPINION

Sweet, D.J.,

This action has been remanded to this Court for supplementation of the record, *see Davis v. New York City Hous. Auth.*, No. 99-6238 (2d Cir. Feb. 23, 2000) (summary order), following the appeal of defendant The New York City Housing Authority ("NYCHA") from this Court's grant of a permanent injunction to plaintiffs Pauline Davis et al. (the "Davis Plaintiffs") enjoining NYCHA from implementing the Working Family Preference ("WFP") at NYCHA housing projects with a disproportionately high rate of white occupancy (the "Disproportionate Projects"), *see Davis v. New York City Hous. Auth.*, 60 F. Supp.2d 220 (S.D.N.Y. 1999). The

Court of Appeals has directed further factual development as to three questions: (1) how actual move-out rates in 1998 under the WFP affect the analyses of the expert witnesses; (2) a comparison of how many months it is expected to take to achieve a white occupancy rate below 30% at each of the Disproportionate Projects under the original Tenant Selection and Assignment Plan ("TSAP") versus under the TSAP as modified by the WFP; and (3) whether the tables presented in this Court's prior opinion of August 11, 1999, *see Davis v. New York City Hous. Auth.*, 60 F. Supp.2d 220 (S.D.N.Y. 1999), should be revised to reflect a projected white admissions rate below 9.9%.

The background and prior proceedings in this action have been set forth in previous opinions and will not be recounted here. *See Davis v. New York City Hous. Auth.*, 1992 WL 420923 (S.D.N.Y. Dec. 31, 1992) (*Davis I*); *Davis v. New York City Hous. Auth.*, 1997 WL 407250 (S.D.N.Y. July 18, 1994) (*Davis II*); *Davis v. New York City Hous. Auth.*, 1997 WL 711360 (S.D.N.Y. Nov. 13, 1994) (*Davis III*); *Davis v. New York City Hous. Auth.*, 166 F.3d 432 (2d Cir. 1999) (*Davis IV*); *Davis v. New York City Hous. Auth.*, 60 F. Supp. 2d 220 (S.D.N.Y. 1999) (*Davis V*); *Davis v. New York City Hous. Auth.*, No. 99-6238 (2d Cir. Feb. 23, 2000) (summary order) (*Davis VI*). Following remand, briefs and affidavits were submitted addressing the questions raised by the Court of Appeals. Oral argument was heard on May 3, 2000.

I. *Actual 1998 Move-out Rates and Their Effect on the Experts' Conclusions*

The first question raised by the Court of Appeals was "whether and to what extent actual move-outs correspond with projected move-outs and whether and to what

extent the actual numbers influence the experts' conclusions." *Davis VI*, at 2.

Plaintiffs' expert, Dr. Leonard A. Cupingood ("Dr. Cupingood") has set forth the relevant data in Table 1 of his April 13, 2000 Affidavit. NYCHA's expert, Dr. David W. Peterson ("Dr. Peterson") has set forth comparable data in Tables 2a and 2b of his Seventh Affidavit. The 1998 numbers differ slightly between the two sets of data because Dr. Peterson used a methodology to adjust NYCHA's internally inconsistent data, while Dr. Cupingood used the NYCHA data without making the adjustment. (*See* Peterson Eighth Aff. ¶ 10 n.3; Cupingood April 28, 2000 Aff. ¶ 19 n.1.) It is not clear whether the adjusted or the non-adjusted data is better for the comparison made here. (*See* Cupingood April 28, 2000 Aff. ¶ 19 n.1.) In any event, as explained below, the experts agree that use of the actual 1998 data does not necessarily increase accuracy nor does it influence their conclusions; thus, differences between the two sets of data are immaterial. For convenience, both Dr. Cupingood's and Dr. Peterson's data are reproduced below in Table 1.

Table 1

*Project**	*Overall Rate(%)***		*White Rate (%)*			*Non-White Rate (%)*		
	1991-94	**1998**	**1991-94**	**1998 (Cup.)**	**1998 (Pet.)**	**1991-94**	**1998 (Cup.)**	**1998 (Pet.)**
Bay View	6.5	4.9	9.1	7.5	7.7	2.9	3.4	4.5
Berry	6.5	10.0	7.4	10.1	9.4	3.5	9.8	13.7
Cassidy-Lafayette	10.3	12.9	12.9	13.5	14.0	4.5	12.4	14.7
Forest Hills	4.5	2.5	5.8	3.3	7.4	2.5	1.6	0.0
Haber	8.7	8.2	10.0	6.3	7.3	7.4	10.3	12.1

*Project**	*Overall Rate(%)***		*White Rate (%)*			*Non-White Rate (%)*		
	1991-94	**1998**	**1991-94**	**1998 (Cup.)**	**1998 (Pet.)**	**1991-94**	**1998 (Cup.)**	**1998 (Pet.)**
Holmes Towers	8.3	8.1	9.7	10.1	9.5	7.1	7.2	8.6
Independence	1.6	3.7	1.7	3.0	2.5	1.6	4.9	0.8
Isaacs	6.0	6.3	8.0	8.3	6.3	3.4	5.1	6.9
Middletown Plaza	12.0	10.9	10.4	14.7	14.7	15.4	6.3	7.5
New Lane	8.7	9.5	9.5	10.6	11.1	4.2	6.8	8.1
Nostrand	7.1	7.0	8.2	8.7	8.9	4.6	5.7	6.8
Pelham Parkway	6.2	6.2	8.0	6.6	6.2	3.9	5.9	8.7
Pomonok	5.5	6.9	6.1	7.5	7.4	4.6	6.4	9.0
Robbins Plaza	11.4	15.3	12.7	20.5	20.5	8.5	9.0	11.9
Sheepshead Bay	7.5	7.4	9.5	9.4	9.1	4.8	6.2	8.1
South Beach	7.4	6.5	8.4	5.7	6.1	5.3	7.4	7.4
Straus	4.4	3.4	8.9	2.5	2.5	1.1	3.8	4.4
Taylor St./ Wythe Ave.	2.2	2.7	1.5	1.1	1.1	3.1	4.7	4.7
Todt Hill	6.0	5.8	7.6	6.6	7.1	3.3	5.0	5.8
Williams	2.0	2.2	1.5	2.0	2.3	3.1	2.4	2.4
Overall***	6.8	7.3	8.6	8.8		4.4	6.5	

* Peterson includes Glenwood, but it is no longer a Disproportionate Project, so it is omitted here.

** Peterson does not include statistics on the overall rate.

*** Weighed by the Number of Move-Outs; Peterson does not calculate this figure.

Dr. Cupingood has concluded that using actual 1998 turnover rates, as opposed to historical turnover rates

from the period 1991 to 1994, "does not necessarily lead to more accurate projections of future occupancy levels because the 1998 rates reflect a single year, rather than a four-year period." (Cupingood April 13, 2000 Aff. ¶ 3(a).) Turnover rates for a single year "can be expected to have a higher variation than during a four-year period." (*Id.* ¶ 4.) Dr. Peterson has concluded that use of 1998 turnover rates "is generally typical of the values that occurred in 1991-94," and therefore "the effect of knowing the actual turnover rates for 1998 is not so much to change the projections into the future as it is to emphasize the fact that they are uncertain." (Peterson Seventh Aff. ¶ 12.) Dr. Peterson, nevertheless, agrees with Dr. Cupingood that use of the actual 1998 numbers does not necessarily increase the accuracy of the projections. (Peterson Eighth Aff. ¶ 9.)

Use of the actual 1998 numbers did not influence the experts' conclusions.[1]

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[1] Dr. Cupingood did, however, note that use of actual 1998 rates "causes an *increase* in the expected segregative impact of the WFP." (Cupingood April 13, 2000 Aff. ¶ 3(a).) Dr. Cupingood estimates that, using the 1998 data, a white admissions rate of 9.9%, and separate turnover rates by race would result in 497 more white families at the 20 Disproportionate Projects after five years, as compared with 422 using the 1991-1994 rates. (*See id.* ¶ 7.) After ten years, the 1998 data would result in 816 more white families as opposed to 696 using the 1991-1994 rates. (*See id.* ¶ 10.)

Dr. Peterson, by contrast, concludes that use of the 1998 turnover rates would cause an increase in the time required to reach 30% white occupancy under the WFP for certain of the Disproportionate Projects, and a decrease in the time for certain other Disproportionate Projects. (*See* Peterson Eighth Aff. ¶ 13.)

II. *Expected Delay in Reaching 30% White Occupancy Rate Under TSAP Versus WFP*

The second question raised by the Court of Appeals was "(a) under the original Tenant Selection and Assignment Plan ("TSAP"), how many months [is it] expected to take to achieve a white occupancy rate below 30% at [each of the Disproportionate Projects]; and (b) under the modified TSAP incorporating the WFP, how many months [is it] expected to take to achieve a white occupancy rate below 30% at [each of the Disproportionate Projects?]" *Davis VI*, at 2.

The Court of Appeals did not specify whether it wished this question to be answered using projections from the 1998 move-out rates or from the 1991-94 rates. As set forth above, because the experts agree that the 1991-94 rates are as acceptable as the 1998 rates, the data set forth here is based on projections from the 1991-94 rates. Data using the 1998 rates has also been calculated and is contained in the affidavits of Dr. Cupingood and Dr. Peterson. In addition, for the reasons set forth below in Section III of this opinion, the calculations of delay assume a 9.9% white admissions rate. Finally, it is appropriate to utilize statistics based on turnover by race, as opposed to overall turnover.

Dr. Cupingood has set forth the relevant data in Table 6A of his April 13, 2000 Affidavit. For convenience, the portion relevant to the question raised by the Court of Appeals is reproduced below as Table 2. Dr. Peterson's calculations are rejected because they were done assuming a 6.28% white admissions rate without the WFP and an 8.28% rate with the WFP. (*See* Peterson Seventh Aff. ¶ 19.) The calculations previously adopted by this Court in *Davis V* were made assuming a 4.2% white admissions rate without the WFP, *see Davis V*, 60 F. Supp. 2d

at 238 n.16, and the Court of Appeals did not remand for the purpose of reconsidering that rate.

Table 2

Project	*Months to Reach 30% Without WFP*	*Months to Reach 30% With WFP*
Bay View	17	21
Berry	195	Will Never Reach 30%
Cassidy-Lafayette	195	Will Never Reach 30%
Forest Hills	149	246
Haber	146	Will Never Reach 30%
Holmes Towers	Already Below 30%*	Already Below 30%*
Independence	620	899
Isaacs	18	29
Middletown Plaza	Will Never Reach 30%	Will Never Reach 30%
New Lane	Will Never Reach 30%	Will Never Reach 30%
Nostrand	57	85
Pelham Parkway	6	8
Pomonok	84	171
Robbins Plaza	355	Will Never Reach 30%
Sheepshead Bay	23	35
South Beach	163	Will Never Reach 30%
Straus	Already Below 30%*	Already Below 30%*
Taylor St./ Wythe Ave.	649	1323
Todt Hill	103	198
Williams	707	1066

* After Davis Move-Ins.

III. *The Tables in Davis V Will Not Be Revised*

The third request of the Court of Appeals was that this Court "consider whether the tables presented in its opinion that relied on the 9.9% admissions rate should be

revised in light of Dr. Cupingood's July 27, 1999 affidavit." *Davis VI*, at 3.

The 9.9% projected white admission rate under the WFP was arrived at by Dr. Cupingood using a computer simulation and 1995 data, before the WFP went into effect. Using actual data from 1998, adjusted for the "pipeline effect" and other factors, Dr. Peterson concluded that the actual white admission rate would be 6.88%. (Peterson Seventh Aff. ¶ 5.) Dr. Cupingood disputed this figure, asserting that the proper rate would be 8.53%. (Cupingood July 27, 1999 Aff. ¶ 10.) Dr. Cupingood acknowledges that the calculation of the 8.53% rate was based on a copying error and that the correct rate using that methodology should have been 8.28%. (Cupingood April 13, 2000 Aff. ¶ 25.)

Dr. Cupingood does not believe, however, that his calculations should be adjusted for an 8.28%, rather than 9.9%, rate, as the existence of this Court's injunction at the Disproportionate Projects could have led to white "turndowns," i.e., certain white families may have declined offers to live in public housing unless they could live in a predominantly white project. (Cupingood April 13, 2000 Aff. ¶ 26.) To buttress this proposition the Davis Plaintiffs cite to John Yinger, *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination* 13-14 (1995) (noting that many white families prefer neighbors who are also white), and to various cases, *see United States v. Starrett City Assocs.*, 840 F.2d 1096, 1099 (2d Cir. 1988); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 110 (1979); *Barrick Realty, Inc. v. City of Gary*, 354 F. Supp. 126, 135 (N.D. Ind. 1973), *aff'd* 491 F.2d 161 (7th Cir. 1974). NYCHA, though it disputes the admissibility of the Yinger cite as evidence, is unable to contravene the unfortunate fact of the underlying proposition.

Dr. Cupingood also asserts that Dr. Peterson invalidly compared data between 1997 and 1998, because the applicant pools differ each year. (Cupingood April 28, 2000 Aff. ¶ 2(c).)

Dr. Peterson responds that Dr. Cupingood has provided no evidence to support the assertion that the WFP would artificially lower the system-wide intake rate for white families below 9.9%. (*See* Peterson Eighth Aff. ¶ 4.) Moreover, Dr. Peterson contends that Dr. Cupingood's calculation method already accounts for the possibility of such an artificial depression, because Dr. Cupingood assumed that the percentages of white and non-white families placed in one of the Disproportionate Projects in the years 1991-94 would be the same as the percentages of white and non-white qualified families which in the future would desire to be placed in a Disproportionate Project, regardless of the policy under which they would qualify. (*See id.* ¶ 5.)

Dr. Cupingood's reasoning is more persuasive. Combination of the 1997 and 1998 data, which is drawn from two separate applicant pools, introduces new uncertainties into the calculations. Also, it is not clear from Dr. Peterson's affidavit whether Dr. Cupingood's methodology did in fact already account for the possibility of artificial depression due to the WFP. Dr. Cupingood's computer simulation using the 1995 data remains the best means of estimating the expected white admissions rate under the WFP, and consequently the 9.9% rate used in the previous findings of fact will not be revised.

However, regardless of the conclusions reached in the preceding paragraph, Dr. Cupingood, in his April 13, 2000 Affidavit, has already calculated the effect of relying upon a 8.28% rate revision. (*See* Cupingood April 13, 2000 Aff., Tables 8A-13B.) As the calculations set

forth in Tables 8A-13B of that affidavit demonstrate, utilization of an 8.28% rate does not significantly decrease the WFP's effect of delaying the desegregation of the Disproportionate Projects. Thus, adoption of the 8.28% rate, and revision of the calculations, would not change this Court's prior conclusion that implementation of the WFP at the Disproportionate Projects would result in a significant perpetuation of discrimination.

It is so ordered.

New York, NY
June 20, 2000

ROBERT W. SWEET

ROBERT W. SWEET
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 99-6238
Filed February 23, 2000

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23 day of February two thousand.

PRESENT:

Hon. Amalya L. Kearse,
Hon. John M. Walker, Jr.,
Hon. Rosemary S. Pooler,
Circuit Judges.

PAULINE DAVIS; CYNTHIA WILLIAMS; BLANCA IRIS HERNANDEZ, on behalf of themselves and all others similarly situated; GINA CAMPBELL, on behalf of themselves and all others similarly situated; JEANETTE VARGAS, on behalf of themselves and all others similarly situated; CORNELIA SIMMONS; KIM RIVERA,

Plaintiffs-Appellees,

—v.—

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Appellant.

APPEARING FOR APPELLANT:

HENRY SCHOENFELD, of Counsel
(Jeffrey Schanback, General
Counsel, on the brief),
New York City Housing Authority,
New York, NY

APPEARING FOR APPELLEES:

SCOTT A. ROSENBERG, Director of
Litigation (Helaine Barnett,
Attorney-in-Charge, on the brief),
The Legal Aid Society, Civil
Appeals & Law Reform Unit,
New York, NY

Appeal from the United States District Court for the Southern District of New York (Sweet, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this matter is remanded to the district court for supplementation of the record.

Defendant-appellant New York City Housing Authority ("Authority") has appealed from the August 11, 1999 judgment of the district court granting the motion by plaintiffs-appellees Pauline Davis et al. ("plaintiffs") for an order permanently enjoining the Authority from implementing the working family preference ("WFP") at housing projects whose tenant body is more than 30% white.

Following consideration of the briefs and oral arguments of the parties and the record on appeal, the panel has determined that it would benefit from further factual development in three areas. First, we would like to know how the actual figures for move-outs under the WFP, to the extent such data are available, affect the analysis of the expert witnesses. For example, plaintiff's expert's projections were based on historical move-out rates from the period 1991-94. However, beginning in 1998, the WFP has been implemented at all projects not covered by the injunction, so that data as to actual move-outs by race or ethnicity may be available. Plaintiff's counsel indicated at oral argument that actual move-out figures from 1998 were not available at the time of the hearing below. If these data are currently available, we would like to know whether and to what extent actual move-outs correspond with projected move-outs and whether and to what extent the actual numbers influence the experts' conclusions.

Second, because the legal significance of the impact of the WFP on the rate of desegregation of the sites covered by the district court's injunction may turn in substantial part on the expected delay, if any, in desegregating each project if the WFP is implemented there,

we would like to have data as to each project bearing on the following questions: (a) under the original Tenant Selection and Assignment Plan ("TSAP"), how many months it is expected to take to achieve a white occupancy rate below 30% at that project; and (b) under the modified TSAP incorporating the WFP, how many months it is expected to take to achieve a white occupancy rate below 30%.

Third, we suggest that the district court revisit the question of whether to credit projections that relied on an estimation that white admissions under the WFP would increase to approximately 9.9%. Plaintiff's expert, Dr. Leonard Cupingood, on whose data the district court relied, appears to suggest in an affidavit dated July 27, 1999 that using actual figures on white admissions under the WFP, after accounting for the so-called "pipeline effect" and other factors, reduces the projected white admissions rate to 8.53%. The Authority notes in response that correction of a calculation error by Dr. Cupingood would lower this figure to 8.28%. Although Dr. Cupingood states that the revised figure of 8.53% would not alter his "fundamental conclusion that the WFP will significantly slow or reverse desegregation at the 21 Disproportionate Projects," the effect of the WFP at each housing project should be evaluated on the basis of tables that rely on an estimated white admissions rate that is as accurate as possible. We therefore ask the district court to consider whether the tables presented in its opinion that relied on the 9.9% admissions rate should be revised in light of Dr. Cupingood's July 27, 1999 affidavit.

Accordingly, we remand this case to the district court for supplementation of the record, pursuant to the procedures described in *United States v. Jacobson*, 15 F.3d 19, 21-22 (2d Cir. 1994). We request that, within sixty

days of this order, the district court, after receiving any additional submissions from the parties and their experts, make further express findings and, if warranted, modify its existing findings.

The mandate shall issue forthwith and shall state that the parties are to inform the clerk of this court when the district court has issued its supplementation of the record in accordance with this order. Following such notification, jurisdiction of the appeal will be automatically restored to this court, and the clerk will reassign the appeal to this panel, without a need for either party to file a new notice of appeal. After jurisdiction is restored, the clerk shall set an expedited briefing schedule, and the parties may, if they wish, submit supplemental letter briefs not to exceed 10 single-spaced pages confined to the implications on the case of the data requested in this order and the district court's findings with respect thereto. It is unlikely that further oral argument will be necessary.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: LUCILLE CARR
Lucille Carr, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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90 Civ. 0628 (RWS)

PAULINE DAVIS, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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92 Civ. 4873 (RWS)

UNITED STATES OF AMERICA,

Plaintiff,

—against—

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

A P P E A R A N C E S:

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Of Counsel

OPINION

Sweet, D.J.

Once again before the Court, this time on remand, is the motion by Pauline Davis, et al (the "Davis Plaintiffs") to enjoin the defendant New York City Housing Authority ("NYCHA" or the "Authority") from implementing the Working Family Preference ("WFP") contained in its proposed changes to its Tenant Selection and Assignment Plan ("TSAP") incorporated by reference in the Consent Decree in this action. In addition, NYCHA has moved to lift the preliminary injunction previously issued. Upon the findings and conclusions set forth below, the motion of the Davis Plaintiffs is granted, and the preliminary injunction is made permanent. The NYCHA's motion is denied.

As will appear in greater detail below, this action from its inception has been hard fought, and the issues have been difficult and complicated. As the Consent Decree approaches its sunset,[1] the Davis Plaintiffs seek to employ its provisions to achieve remediation of the conditions which gave rise to the action, while NYCHA contends that the Consent Decree has achieved its purpose. While there clearly are conflicting contentions concerning the proposed changes in the TSAP, the underlying questions during this phase of the litigation concern the continued viability and scope of the Consent Decree. The resolution of those issues overshadow and underlie the specifics of the WFP controversy.

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[1] By its terms, the Consent Decree entered on July 1, 1992, to which the United States of America was a party, will expire on January 1, 2001.

Prior Proceedings

The description of the prior proceedings contained in the opinion of the Court of July 18, 1997 (the "July 18 Opinion") remain relevant but need not be repeated. Prior decisions include *Davis v. New York City Housing Authority*, 1992 WL 420923 (S.D.N.Y. Dec. 31, 1992) (*Davis I*); *Davis v. New York City Housing Authority*, 1997 WL 407250 (S.D.N.Y. July 18, 1994) (*Davis II*); *Davis v. New York City Housing Authority*, 1997 WL 711360 (S.D.N.Y. Nov. 13, 1994) (*Davis III*); *Davis v. New York City Housing Authority*, 166 F.3d 432 (2d Cir. 1999) (*Davis IV*), familiarity with which is assumed. Those facts and prior proceedings relevant to the instant motion are set forth below.

The July 18 Opinion held that while the proposed WFP did not have an "adverse impact" on minority applicants, it would perpetuate past segregation in predominantly white projects and granted the Davis Plaintiffs a preliminary injunction prohibiting the adoption of the proposed WFP. The Court also granted NYCHA leave to apply for a modification of the injunction "upon a showing that the Working Family Preference will be implemented in a manner that will not affect desegregation in projects with a disproportionately high rate of white occupancy." *Davis II*, 1997 WL 407250 at *18.

The NYCHA filed a notice of appeal and moved for reconsideration. The motion for reconsideration was denied on November 13, 1997 on the grounds that on a motion to reconsider, the NYCHA "may not advance new facts, issues or arguments not previously presented to the court." *Davis III*, 1997 WL 711360 at *3 (internal quotations and citations omitted). However, the injunction was modified to permit NYCHA to implement the WFP "as proposed in any project where white families do not constitute more than 30 percent of the families at

the project."[2] *Id.* at *5. NYCHA filed another notice of appeal.

On January 22, 1999, the Court of Appeals filed its opinion by Chief Judge Morey L. Sear, sitting by designation, vacating the July 18 Opinion, but leaving the preliminary injunction intact, "until the district court has had the opportunity to address these matters on remand." *Davis IV*, 166 F.3d at 438. In particular, the Second Circuit noted that paragraph 13 of plaintiffs' expert Dr. Cupingood's ("Dr. Cupingood") Second Affidavit,[3] and the July 18 Opinion, were deficient because:

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[2] The July 18 opinion was narrowed to enjoin the WFP at only 21 NYCHA developments classified as "predominantly white" in the TSAP which was incorporated in the Consent Decree. "Predominantly white" is the term used for projects where more than 30% of the units are rented to white families. These projects are referred to as "Disproportionate Projects" and/or "Affected Developments" and these terms have become terms of art in this litigation.

[3] In paragraph 13 of Dr. Cupingood's Second Affidavit he states:

> I was also asked to calculate the effect that the proposed changes to the TSAP would have on slowing down the desegregation in projects which were more than 50 percent white as of June 1996. Information supplied to me indicated that the following 11 projects were more than 50 percent white as of June 1996—Berry, Cassidy-Lafayette. Forrest Hills, Independence, Middletown Plaza, New Lane, Robbins Plaza, South Beach, Taylor-Wythe, Todt-Hill, and Williams. Some of these projects are affected by the Davis Consent Decree. For these "Davis" projects, I first conservatively assumed that all units set aside for Davis tenants would represent replacement for white tenants. Then assuming the turnover rates and move-in rates from Appendix E of [NYCHA expert] Dr. Peterson's affidavit continued and that the proposed changes to the TSAP were adopted, I calculated that a) there would be no further desegregation at four of the projects, b) the desegregation would be reversed at four other

(a) "it is unclear to which proposed change—project choice or working family preference, or both—plaintiffs' expert attributes the perpetuation of segregation." *Davis IV*, 166 F.3d at 437;

(b) the time period during which the purported impact of the proposed TSAP changes will allegedly occur is not specified. *See id.* at 436;

(c) there is no discussion of, or data reflecting, the so-called "existing trends" allegedly showing that additional white families admitted under the WFP will concentrate in predominantly white developments. *Id.*;

(d) the subsidiary facts and methodology underlying the ultimate finding are not adequately explained. *See id.*;

(e) plaintiffs' expert does not identify the precise numerical data underlying his opinion. *See id* at 437;

(f) the names of the developments at which the WFP will allegedly perpetuate segregation is not identified. *See id* at 436;

(g) plaintiffs' expert expressed no opinion as to whether the WFP will perpetuate segregation at ten of the developments covered by the injunction. *See id*; and

(h) the number, fraction, or percentage of additional white families who will be admitted to each of the 21 developments as a result of the WFP is not stated. *See id.*

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projects, and c) the desegregation would be slowed significantly at three projects. Thus, adoption of the proposed changes to the TSAP would adversely affect the desegregation at these majority white projects.

The remand was filed on February 18, 1999, a pretrial conference was held, and a hearing was held on June 18, 1999. Additional affidavits, memoranda and arguments were received through July 27, 1999, at which time which the matter was deemed fully submitted. Although offered, neither party sought to examine or cross-examine any of the witnesses, expert or otherwise.

The Scope of the Remand

Initially the Court of Appeals stated: "we consider Judge Sweet's findings on the issue of perpetuation of segregation insufficient under Rule 52(a). While not entirely devoid of detail, Judge Sweet failed to adequately explain the subsidiary facts and methodology underlying the ultimate finding." *Davis IV*, 166 F.3d at 436. In particular, the number of white families projected to be admitted to the projects at issue was found wanting.

The Court of Appeals was also unable to determine whether paragraph 13 of the affidavit of Dr. Cupingood, which was adopted by the district court as a finding, reflected changes discussed were attributable to which proposed change—project choice, the WFP, or both.

The Court of Appeals also had difficulty in determining the source of statistics underlying Dr. Cupingood's ultimate finding that the proposed WFP would perpetuate segregation at certain NYCHA developments. For these reasons, the Court concluded Dr. Cupingood's affidavit was so "vague and conclusory" as to permit the discovery of relevant matters from the record and required remand "for proceedings consistent with this opinion."

Although the Authority did not appeal on the basis of a failure to conduct an evidentiary hearing, the Court

pointed out "when a factual issue is disputed, oral testimony is preferable to affidavits."

The Court recognized that NYCHA's position that the effect of the TSAP on segregation was *de minimis* was advanced after the filing of the notice of appeal and had not been dealt with by the district court, but noted that on remand the proper standard to be applied is "whether the proposed working family preference will *significantly* perpetuate segregation at the relevant NYCHA developments." *Davis IV*, 166 F.3d at 438 (emphasis in original).

The Facts

Based upon the hearing, the facts set forth in the affidavits of Dr. Cupingood and Dr. David W. Peterson (NYCHA's expert witness) ("Dr. Peterson") are supported by the data cited and are credible, although certain of the conclusions drawn from these facts remain in contention. The facts as set forth below are found on the basis of the prior proceedings and the affidavits of the parties and the experts. Neither of the parties sought a hearing to challenge the process by which the following facts were established.

A. *The Consent Decree*

In 1992, NYCHA, the Davis Plaintiffs and the United States entered into a Consent Decree permanently enjoining various racially discriminatory tenant selection and assignment practices at NYCHA's public housing projects. (Consent Decree ¶ 4(a)-(h)). The Consent Decree provided *inter alia* for: (1) injunctive relief barring future housing discrimination on the basis of race, color or national origin, (Consent Decree ¶ 4); (2) the implementation of a new TSAP which substantially revised NYCHA's tenant selection and assignment sys-

tems, and which prohibits further discrimination, (Consent Decree ¶¶ 5-9); (3) remedial relief for 2,190 claimants of NYCHA's past discrimination,[4] (Consent Decree ¶¶ 10-39); and (4) significant record keeping and reporting by NYCHA regarding tenant selection and assignment practices. (Consent Decree ¶¶ 43-48).

The Consent Decree also requires NYCHA to "adopt and implement the TSAP . . . to prevent any unlawful discrimination on the basis of race, color, or national origin, in compliance with the Housing Authority's obligations therewith under Title VI, the Fair Housing Act and the implementing regulations and requirements of HUD." (Consent Decree ¶ 5). In adopting and implementing the TSAP with "respect to existing projects and new projects to be opened in the future," NYCHA agreed that it would use "no racial quota system, or other practice technique or device to house Applicants in particular projects, buildings, or apartments, or to otherwise limit the availability of housing, on account of race, color, or national origin." (Consent Decree ¶ 7(a)).[5]

Under the Consent Decree, NYCHA's TSAP must remain in effect for at least five years (Consent Decree ¶ 6(a)) and during that time, the Plaintiffs may not challenge actions by NYCHA that comply with the TSAP as racially discriminatory. *Id.* However, the Consent Decree permits challenges to any amendments to the TSAP adopted or proposed by NYCHA during the five year period (¶ 6(b)).

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[4] The remedial relief consisted of awarding HUD Section 8 housing vouchers to 200 claimants; the remaining 1,990 victims received priority placement at any of 31 so-called "Affected Developments" where past segregation occurred.

[5] The TSAP was designed "to assure that [the Housing Authority] receives and processes applications for conventional public housing efficiently and in accordance with the laws." TSAP, § I at 1.

B. *The Working Family Preference*

In July 1995, NYCHA proposed to change the TSAP by adopting the WFP. The essential difference between the original TSAP and the WFP is the WFP's elimination of the "applicant's need for housing" as a priority. Instead, the WFP gives preference to families based on income. Thus, under the original TSAP, priority was afforded to families who needed housing the most. Under the WFP, in contrast, priority is afforded to families who can pay the most, regardless of their housing need.

In *Davis II*, this Court described the operation of the WFP as follows:

> NYCHA would establish new local priorities as part of the applicant selection process. The highest local priority would be assigned to the highest income, Tier III applicants. The second priority is given to Tier II families. The lowest priority is given to Tier I families, but only to those who are working or are disabled. Tier I families receiving public assistance would receive no local priority. In addition, the proposed TSAP would categorize federal preference holders as working (including the disabled) or "non-working." The federal preference holders who are working or disabled would receive a priority over those who are not. NYCHA also proposes to increase to 50% the proportion of new rentals to local preference holders and to reduce the proportion of rentals to federal preference holders to 50%

Davis II, 1997 WL 407250, at *4.

As set forth in *Davis II*, 1997 WL 407250 at *14, local preferences favoring working families are permitted, *see* 24 C.F.R. § 960.205(a) (1995), and such preferences do not require approval by the Department of Housing and

Urban Development ("HUD"). The Davis Plaintiffs concede the proposed objectives of the WFP, namely, income integration in public housing and increasing the number of working families in public housing, are legitimate, but contend that the NYCHA has not sustained its burden of demonstrating that there is no less discriminatory means of advancing the same interests. Plaintiffs proposed an alternative method of increasing the representation of upper income families that would have a less racially discriminatory effect than the proposed WFP, a method which NYCHA has rejected.

C. *The Effect of the Working Family Preference*

According to NYCHA's computer tapes, 5,885 families moved into NYCHA apartments during 1995. The racial breakdown of those families, along with the racial breakdown that would have occurred if the WFP had been in effect during that year, are summarized in the following table:

Table 1

Race Distribution of 1995 Rentals Under Original TSAP and WFP

	White	African-American	Puerto Rican	Other Hispanic	Other	Total
Original TSAP	250	2703	1768	860	340	5885
WFP	580	2594	1339	835	537	5885
Difference	330	–109	–429	–25	233	0

For future projections, Dr. Cupingood assumed that families of each race will make decisions about which projects to choose in the same manner, and with the same probabilities, as families of that race have done in the past.

NYCHA records move-outs and move-ins by race for each project in a report entitled, "Tenant Statistics by Race." NYCHA's expert, Dr. Peterson, annexed such reports as Exhibit E to his January 7, 1999 affidavit. Dr. Cupingood relied on these reports in his original affidavit and in this report in calculating expected move-out and move-in rates.

To calculate the probable number of white move-outs at each Disproportionate Project, Dr. Cupingood began by selecting a period for historical reference. Since Davis claimants began moving into Affected Developments in August 1995, the last year that is free of distortion by Davis move-ins is 1994. Additionally, since the bulk of NYCHA's discriminatory practices ended in 1990, the first year that is free of distortion caused by NYCHA's own discrimination was 1991. Thus, Dr. Cupingood selected the years 1991 through 1994 as a period for historical reference.

For each Disproportionate Project, Dr. Cupingood then calculated move-out rates based on NYCHA's Tenant Statistics by Race for the period 1991 through 1994. For example, if the population of a project at the beginning of 1991 was 100, and if 5 families moved out during 1991, then the move-out rate for 1991 at that project was 5 percent (Cupingood Report, ¶ 8). Based on calculations like these for each Disproportionate Project for each year from 1991 to 1994, Dr. Cupingood determined the average move-out rate for each project. As a further refinement, Dr. Cupingood also calculated race-specific move-out rates for each Disproportionate Project (*Id.*). He then determined the probable number of white move-outs at each project in a given year by applying the appropriate turnover percentage to the population at the end of the year. (Cupingood Report, ¶ 9).

Using the historical period 1991-1994, Dr. Cupingood determined the total number of move-ins of each race into each project. He then determined the percentage of the total for white and non-whites who moved into each Disproportionate Project.[6] For example, there were 1,775 white move-ins during the four year period, 67 of whom moved into New Lane. The relative likelihood of a white family selection New Lane was therefore 67 divided by 1775, or 3.78% (Cupingood Report; ¶ 10 & Table 3).

Among all non-white move-ins from 1991 to 1994, 8.35 percent moved into one of the Disproportionate Projects.

Table 2

Clustering by White Families in Disproportionate Projects

Project Name	White	Non-White
Bay View	2.14%	1.18%
Berry	1.92%	0.03%
Cassidy-Lafayette	3.78%	0.19%
Forest Hills	0.73%	0.16%
Glenwood	0.56%	0.85%
Haber	1.86%	0.27%

[6] Three Disproportionate Projects in the Williamsburg area of Brooklyn required special consideration during this analysis. On April 17, 1991, NYCHA settled a contempt motion with the plaintiffs in *Williamsburg Fair Housing Comm. v. New York City Housing Auth.*, 76 Civ. 2125 (S.D.N.Y.). As part of that settlement, NYCHA agreed to provide relief to identified victims of racial quotas that NYCHA enforced at the Independence, Williams, and Taylor Wythe projects between 1980 and February 1988. During the 1992-94 time period, over a third of all apartments rented at the three Williamsburg area projects were to victims of discrimination who moved in pursuant to that settlement. All victims in the *Williamsburg* case were families of color. In calculating move-in rates at these projects for the 1991-94 time period, Dr. Cupingood excluded move-ins that were made pursuant to the *Williamsburg* settlement. (*See* Cupingood Report, ¶ 11).

Project Name	White	Non-White
Holmes Towers	0.90%	0.44%
Independence	0.17%	0.08%
Isaacs	1.30%	0.33%
Middletown Plaza	1.92%	0.14%
New Lane	3.78%	0.10%
Nostrand	2.48%	0.87%
Pelham Parkway	1.13%	0.90%
Pomonok	3.89%	1.14%
Robbins Plaza	1.69%	0.12%
Sheepshead Bay	1.92%	0.85%
South Beach	1.80%	0.23%
Straus	0.68%	0.10%
Taylor-Wythe	0.11%	0.07%
Todt Hill	1.35%	0.25%
Williams	0.11%	0.10%
Total	**34.19%**	**8.38%**

Dr. Cupingood applied these figures to determine the probable impact on the WFP on move-in and move-out rates at each Disproportionate Project. He began by assuming that the WFP would have the racial impact calculated in his original November 14, 1996 affidavit, and adopted by this Court in its findings in *Davis II*. That is, he assumed that white admissions would comprise 9.9 percent of all admissions; African-Americans 44.1 percent; and so forth. *See Davis II*, 1997 WL 407250, at *4 (Cupingood Report, ¶ 12).

Next, using the historical move-in and move-out rates described above, he calculated the number of white move-ins and move-outs that would occur at each Disproportionate Project with the WFP operating. He performed these calculations for each of the next five years, and each of the next ten years. Each calculation was performed using two alternative assumptions. The first assumption posits that move-out probabilities for each race at each project will follow historical trends for that

particular race and project. The second assumption which Dr. Cupingood employed in preparing his original affidavit posits that move-out probabilities for each race at each project will track overall historical turnover rates for that project. Dr. Cupingood then repeated these calculations on the assumption that the WFP was not operating. Again, these calculations were performed for the next five and ten years. Based on these figures, Dr. Cupingood quantified the impact the WFP would have on desegregation at each of the 21 Disproportionate Projects. He did so both in terms of the number of white families affected, and the percentage of white families affected. A summary of changes in the white population at each Disproportionate Project appears below in Table 3.

Table 3

Effect of WFP at Disproportionate Projects After Five Years Assuming Historical turnover by Race

Project Name	Total Apts	Initial White	Five Years After Davis Move-Ins	
			Original TSAP	WFP
Bay View	1491	514	341	368
Berry	502	282	226	253
Cassidy-Lafayette	349	187	148	176
Forest Hills	383	198	158	170
Glenwood	1172	352	212	222
Haber	364	193	144	169
Holmes Towers	527	140	98	115
Independence	715	493	457	463
Isaacs	634	210	157	177
Middletown Plaza	168	87	83	101
New Lane	270	197	175	192
Nostrand	1118	469	335	368

Project Name	Total Apts	Initial White	Five Years After Davis Move-Ins Original TSAP	WFP
Pelham Parkway	1240	394	274	292
Pomonok	2047	850	682	748
Robbins Plaza	148	79	63	77
Sheepshead Bay	1032	363	248	277
South Beach	416	221	173	198
Straus	263	65	48	55
Taylor-Wythe	520	283	266	271
Todt Hill	501	234	179	199
Williams	565	348	326	329
Total	**14436**	**6099**	**4740**	**5172**

Table 4

Relative Percentage Reduction in Number of White Families Due to WFP After Five years Assuming Historical Turnover by Race

Project Name	Reduction in White Families No WFP	WFP	Percentage
Bay View	173	146	15.6%
Berry	56	29	48.2%
Cassidy-Lafayette	39	11	71.8%
Forest Hills	40	28	30.0%
Glenwood	140	130	7.1%
Haber	49	24	51.0%
Holmes Towers	42	25	40.5%
Independence	36	30	16.7%
Isaacs	53	33	37.7%
Middletown Plaza	4	–14	n/a
New Lane	22	5	77.3%
Nostrand	134	101	24.6%
Pelham Parkway	120	102	15.0%
Pomonok	168	102	39.3%
Robbins Plaza	16	2	87.5%
Sheepshead Bay	115	86	25.2%

Project Name	Reduction in White Families		Percentage
	No WFP	WFP	
South Beach	48	23	52.1%
Straus	17	10	41.2%
Taylor-Wythe	17	12	29.4%
Todt Hill	55	35	36.4%
Williams	22	19	13.6%
Total	**1366**	**938**	

As the table indicates, at most projects where the WFP would not cause actual increases in segregation, the impairment in desegregation is at least 25 percent (Cupingood Report, ¶ 15).

The impact on desegregation can also be seen in terms of the percentage of white families who would reside in each Disproportionate Project. Assuming historical turnover by race, after five years under the WFP, the percentage of white families at Middletown Plaza would rise from 51.85 to 60.1% (instead of falling to 49.4%). At the remaining Disproportionate Projects, white occupancy percentages would either stabilize or fall more slowly under the WFP than under the original TSAP. For example, at Cassidy-Lafayette, after five years the percentage of white families in occupancy would inch down from 53.6% to 50.4% (instead of falling to 42.4%). Table 5 below summarizes the changes in white occupancy percentages caused by the WFP after five years (assuming historical turnover by race).

Table 5

Change in Percentage White Occupancy At Disproportionate Projects After Five Years Assuming Historical Turnover by Race

Project Name	Initial % White	Five Years after Davis Move-Ins Original TSAP	WFP
Bay View	34.5%	22.9%	24.7%
Berry	56.2%	45.0%	50.4%
Cassidy-Lafayette	53.6%	42.4%	50.4%
Forest Hills	51.7%	41.3%	44.4%
Glenwood	30.0%	18.1%	18.9%
Haber	53.0%	39.6%	46.4%
Holmes Towers	26.6%	18.6%	21.8%
Independence	9.0%	63.9%	64.8%
Isaacs	33.1%	24.8%	27.9%
Middletown Plaza	51.8%	49.4%	60.1%
New Lane	73.0%	64.8%	71.1%
Nostrand	41.9%	30.0%	32.9%
Pelham Parkway	31.8%	22.1%	23.5%
Pomonok	41.5%	33.3%	36.5%
Robbins Plaza	53.4%	42.6%	52.0%
Sheepshead Bay	35.2%	24.0%	26.8%
South Beach	53.1%	41.6%	47.6%
Straus	28.5%	27.4%	20.9%
Taylor-Wythe	54.4%	51.0%	52.1%
Todt Hill	46.7%	35.7%	39.7%
Williams	61.6%	57.5%	58.2%

Similar trends exist after ten years, except that at Disproportionate Projects where desegregation would not essentially stop, the magnitude of the impact of the WFP would generally become larger. For example, at Middletown Plaza, where segregation would increase under the WFP, the white population would climb to 108 instead of falling to 81. At Berry Houses, where desegregation would be significantly slowed, the white population would fall to 231 instead of 186. In the aggregate, after ten years under the WFP (again assum-

ing historical turnover by race), the Disproportionate Projects would be occupied by 722 more white families than would have resided in those projects in the absence of the WFP. (Cupingood Report, ¶ 16). Table 6 summarizes white occupancy figures after ten years of operation with and without the WFP.

Table 6

Effect of WFP at Disproportionate Projects After Ten Years Assuming Historical Turnover by Race

Project Name	Total Apts	Initial White	Ten Years after Davis Move-Ins	
			Original TSAP	WFP
Bay View	1491	514	230	272
Berry	502	282	186	231
Cassidy-Lafayette	349	187	123	168
Forest Hills	383	198	128	148
Glenwood	1172	352	130	145
Haber	364	193	114	154
Holmes Towers	527	140	73	100
Independence	715	493	425	436
Isaacs	634	210	121	154
Middletown Plaza	168	87	81	108
New Lane	270	197	159	188
Nostrand	1118	469	245	298
Pelham Parkway	1240	394	193	222
Pomonok	2047	850	558	672
Robbins Plaza	148	79	54	76
Sheepshead Bay	1032	363	175	200
South Beach	416	221	141	183
Straus	263	65	36	47
Taylor-Wythe	520	283	250	259
Todt Hill	501	234	140	174
Williams	565	348	305	312
Total	**14436**	**6099**	**3819**	**4530**

Table 7 below summarizes the impact of the WFP on the white population of the Disproportionate Projects, assuming that move-out patterns for each race at each project would reflect the overall historical move-out trend for that project. For all the Disproportionate Projects, the WFP would boost the white population after five years from 5,176 to 5,680—an increase of 504 white families. After ten years, the WFP would boost the white population at the 21 Disproportionate Projects from 4,433 to 5,288—an increase of 855 white families.

Table 7

Effect of WFP at Disproportionate Projects After Five Years Assuming Historical Turnover by Race

Project Name	Total Apts	Initial White	Five Years after Davis Move-Ins	
			Original TSAP	WFP
Bay View	1491	517	401	440
Berry	502	283	244	274
Cassidy-Lafayette	349	187	177	209
Forest Hills	383	198	171	184
Glenwood	1172	356	252	267
Haber	364	193	153	179
Holmes Towers	527	144	109	127
Independence	715	493	460	465
Isaacs	634	219	185	211
Middletown Plaza	168	87	75	93
New Lane	270	197	187	205
Nostrand	1118	471	367	409
Pelham Parkway	1240	403	310	333
Pomonok	2047	852	709	780
Robbins Plaza	148	78	69	83
Sheepshead Bay	1032	365	279	314
South Beach	416	221	185	212

Project Name	Total Apts	Initial White	Five Years after Davis Move-Ins Original TSAP	WFP
Straus	263	65	48	55
Taylor-Wythe	520	283	257	261
Todt Hill	501	235	199	222
Williams	565	348	317	321
Total	**14436**	**6099**	**4740**	**5172**

Discussion

I. *The Issues*

As noted, the Second Circuit has held that the proper standard to be applied on remand is "whether the proposed working family preference will *significantly* perpetuate segregation at the relevant NYCHA developments." *Davis IV*, 166 F.3d at 438. NYCHA has urged that the remediation required by the Consent Decree has been achieved and that therefore there is no perpetuation of segregation which could result from the WFP and no discrimination remaining to be remediated under the Consent Decree. In addition, the Authority contends that if there is segregation extant under the Consent Decree the WFP does not significantly perpetuate it. The Davis Plaintiffs take the contrary view of the issues. The questions to be resolved therefore are:

1. Is there a basis upon which to conclude that there is segregation to be dealt with under the Consent Decree?

2. Does the WFP significantly perpetuate segregation?

II. *There is Segregation to be Dealt with under the Consent Decree*

A. *30 Percent Will Be Used as the Metric By Which Segregation Will Be Determined in this Case*

As an initial matter, the parties disagree as to the appropriate measure for assessing whether segregation exists. As noted, throughout this litigation projects have been deemed "disproportionate" or "predominantly white" if more than 30 percent of the parties residing there are white.[7] *See, e.g., Davis II*, 1997 WL 407250 at *12. The Authority contends that there is nothing in the Consent Decree that supports the inference that if a project is 30 percent white it is disproportionate or segregated.

The sole reference to the 30 percent figure is contained in the TSAP, incorporated by reference in the Consent Decree. Section VIII(A) of the TSAP, entitled the "Project Outreach Plan," states in relevant part that: "if the OCD [Occupancy Control Division] determines that borrowing applications from a nearby project is likely to solve the project's need for applications, it shall select the nearest project that has a sufficient number of applications for that size apartment. However, if the borrowing project's tenant body is more than 30% white, OCD shall not select a project whose tenant body is also more than 30% white." (TSAP at 29, hereinafter the "Borrowing Provision").[8]

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[7] There are now 20 Disproportionate Projects as in the past year, the Glenwood project fell below the 30 percent threshold. As such, this Court's injunction no longer applies to Glenwood.

[8] The revised TSAP of December 15, 1997 contains an identical provision except that OCD is now referred to as the Field Liaison Division ("FLD").

The 30 percent figure set forth in the Borrowing Provision is not, as NYCHA urges, an arbitrary number, but a negotiated figure that implies that the parties and the Court believed that a project was disproportionately white if more than 30 percent of its families are white. *See Armour & Co.*, 402 U.S. at 681 ("Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms"). An examination of Exhibit A to the Consent Decree, a list of projects where it was alleged that discriminatory practices occurred in statistically significant amounts, reveals that during the time in question most of these projects were at least 30 percent white. Plaintiffs aver that the parties adopted the 30 percent figure because "it described in a simple manner that could easily be implemented in the TSAP which projects had been . . . affected by past segregation." (Tr. of June 18, 1999 Hearing at 59).

The TSAP must be read as in harmony with existing law. *See, e.g., Prate v. Freedman*, 583 F.2d 42 (2d Cir. 1978) (before a consent decree can be approved, the court must assure itself that the terms of the decree are not unlawful, unreasonable, or inequitable). Under existing law, borrowing of applications could not have been prohibited at projects more than 30 percent white (without regard for claimant relief) unless those projects were still tainted by past segregation. As will be discussed more fully below, remedies containing race-conscious relief "must be substantially related to the objective of eliminating the alleged instance of discrimination, . . . and must not unnecessarily trammel the interests of affected third parties." *Kirkland v. New York State Dept. of Correctional Serv.*, 711 F.2d 1117, 1132 (2d Cir. 1983). Thus, had there been no finding that housing projects that are greater than 30 percent white were affected

by past segregation, the Borrowing Provision would be unlawful.

This Court has held that "[u]nder the TSAP, a project is considered disproportionately white if more than 30 percent of its families are white." *See Davis II*, 1997 WL 407250 at *12.[9] This finding was not disturbed by the Second Circuit on appeal. Accordingly, 30 percent will continue to be employed as a measure to identify segregation in this case.

B. *The Consent Decree Extends Beyond Remediation of Davis' Victims*

It is the position of the Authority that the Court may no longer consider whether the Disproportionate Projects remain segregated once NYCHA has fully complied with its court-ordered obligations to render remedial relief to the specific victims of its prior discriminatory practices. Specifically, NYCHA urges that "Once remedial relief has been provided under the *Davis* consent decree the Developments can no longer be considered segregated and the WFP cannot, as a matter of law, be said to perpetuate segregation there." (Letter to the Court, dated May 10, 1999, from Henry Schoenfeld, Esq. at 1).

The Authority made this precise argument to the Court of Appeals in this case, and the Second Circuit declined to adopt it. *See Davis IV*, 166 F.3d 432.[10] As a factual

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[9] This does not mean, as NYCHA posits, that the TSAP imposes a "quota" or requires that any particular project achieve any specific level of desegregation. Rather, the TSAP identifies housing projects that are 30 percent white as infected by past segregation. Thus, with regard to these identified projects, changes to the TSAP that significantly perpetuate segregation violate the Fair Housing Act.

[10] In the Authority's brief to the Second Circuit, four pages were devoted to this argument. Page 16 of the Authority's brief reads, "[o]nce the remedial relief under the consent decree is fully imple-

matter, an examination of NYCHA's own statistics reveals that victim relief in this case will not desegregate the Affected Developments.[11] As the following table demonstrates, even after claimant relief is completed, every Affected Development will still have white populations significantly greater than the prevalence of whites in the relevant applicant pool.

Table #8

Project Name	Total Apts	June 1998 #White	June 1998 %White	After Davis Relief #White	After Davis Relief %White	%White In App. Pool
Bay View	1491	520	34.9%	514	34.5%	4.3%
Berry	502	286	57.0%	282	56.2%	6.9%
Cassidy-Lafayette	349	187	53.6%	187	53.6%	35.8%
Forest Hills	383	200	50.9%	198	51.7%	23.1%
Glenwood	1172	362	30.9%	352	30.0%	4.3%
Holmes Towers	527	161	30.6%	140	26.6%	5.2%
Isaacs	634	234	36.9%	210	33.1%	5.2%
Middletown Plaza	168	87	51.5%	87	51.8%	1.9%
New Lane	270	197	73.0%	197	73.0%	35.8%
Nostrand	1118	474	42.4%	469	41.9%	4.3%
Pelham Parkway	1240	420	33.9%	394	31.8%	1.7%
Pomonok	2047	869	42.5%	850	41.5%	3.4%
Robbins Plaza	148	79	53.4%	79	53.4%	5.2%
Sheepshead Bay	1032	368	35.7%	363	35.2%	4.3%

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mented, the working family preference cannot, as a matter of law, perpetuate segregation."

[11] *See* NYCHA Tenant Statistics By Race, June 30, 1998.

Project Name	Total Apts	June 1998 #White	June 1998 %White	After Davis Relief #White	After Davis Relief %White	%White In App. Pool
South Beach	416	223	53.6%	221	53.1%	6.9%
Straus	263	80	30.4%	65	24.7%	5.2%
Todt Hill	501	238	47.5%	234	46.7%	6.9%

As the table indicates, virtually all of the Affected Developments will remain at least 30 percent white even after relief for *Davis* claimants ends. Thus, these projects are not desegregated merely because the process of locating and offering apartments to past victims of discrimination will soon end.

Significantly, the Authority's interpretation is inconsistent with the record upon which the Consent Decree is based. At the time the Consent Decree was entered in 1992, the NYCHA "admitted to race-conscious admissions practices that led to 'racial steering' of white applicants to predominantly white housing projects. Move-in, move-out data also demonstrated a consistent pattern of white families being replaced by other white families over time, a pattern the United States, in its memorandum in support of the Decree concluded 'could only occur as a result of a deliberate racial quota system.' " *Davis II*, 1997 WL 407250 at *10. The Authority has admitted that its discriminatory practices began as early as 1960, (*see* NYCHA Mem. In Support of Fairness and Adequacy of Consent Decree, at 21 (Oct. 30, 1992)), and the Honorable Pierre N. Leval found that these practices persisted and resulted in segregation in New York City public housing as late as 1991. *See Davis v. New York City Housing Authority*, 1992 U.S. Dist. LEXIS 19965, 1992 WL 420923, *2 (S.D.N.Y. December 30, 1992).[12] Under

[12] Judge Leval found that:

> Plaintiffs' evidence supports their allegations that during specified periods of time the Housing Authority selected and

the Consent Decree, however, NYCHA has been required to extend relief only to plaintiff class members who were victims of discriminatory practices between 1985 and 1990. *See* Consent Decree at ¶¶ 1(g)&(l), 10-39. Because the victim relief afforded by the Consent Decree is limited to a subset of the years in which NYCHA practiced racial steering, the Consent Decree's remedial relief provisions only go part of the way toward effectuating desegregation.

NYCHA's position is also belied by the text and structure of the Consent Decree. As the Supreme Court has stated, "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). The Consent Decree is not limited to the relief to be provided to the *Davis* class members. It also includes extensive injunctive relief designed to address the past discriminatory actions of the NYCHA and to ensure the achievement of a non-discriminatory system and the elimination of segregation.

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assigned applicants for public housing, and tenants requesting transfers, to certain housing projects using methods that resulted in unlawful discrimination against Blacks and Hispanics. These methods included (1) the intermittent use of codes denoting housing projects to which only white families could be assigned; (2) the use of zip code and other geographic restrictions on admission to projects; (3) the use of racial goals or targets when new projects were "rented up" and on an ongoing basis thereafter; and (4) the assignment of families to projects where vacancies were not expected to arise. The evidence submitted by plaintiffs also supports their allegations that one or more of these practices continued during the period addressed in the Consent Decree (1983 through 1990, and on Staten Island through May 1991). *Davis v. New York City Housing Authority*, 1992 WL 420923 at *2.

For example, NYCHA is "permanently enjoined from . . . adopting and implementing any tenant application, selection, assignment, and transfer plan, or any such policy or process, which gives preference to Applicants or tenants on the basis of race, color, or national origin." Consent Decree, ¶ 4(a). Other permanent injunctive provisions bar NYCHA from refusing to make rentals or transfers on the basis of race (¶ 4(b)); making statements indicating a preference or limitation based on race (¶ 4(c)); representing on account of race that apartments are not anticipating vacancies when they are, in fact, anticipating vacancies (¶ 4(d)); and a number of other limitations.

These injunctions apply not just to the Affected Developments as defined in ¶ 1(b)—and indeed, not just to "Conventional Public Housing" as defined in ¶ 1(h)—but to all of NYCHA's housing, "conventional or otherwise" (¶ 4), by requiring NYCHA to operate a race-neutral tenant-selection system at all of its housing projects.

Under the Consent Decree, these permanent injunctive provisions may not be construed to bar remedial relief to others who do not receive relief under the Consent Decree. Paragraph 4(j) of the Consent Decree provides:

> Nothing in this paragraph shall be deemed to prohibit the provision of remedial relief under this Consent Decree or remedial relief to any identified victims of past discrimination on the basis of race, color or national origin who do not receive relief under this Consent Decree.

Consent Decree, ¶ 4(j).

In addition to the injunctive decrees in ¶ 4, NYCHA is also enjoined to adopt a TSAP and implement it "to prevent any unlawful discrimination on the basis of race,

color, or national origin, in compliance with the Housing Authority's obligations therewith under Title VI, the Fair Housing Act and the implementing regulations and requirements of HUD." (¶ 5). In implementing the TSAP, NYCHA is barred from using racial quota systems (¶ 7(a)) and neighborhood preferences (¶ 7(b)). NYCHA is also enjoined from referring applicants out of turn to particular projects because of race (¶ 7(c)). Where a dispute arises concerning whether a change by NYCHA to the TSAP violates these provisions, as happened here, NYCHA is permitted, pending resolution by this Court, to:

> implement the proposed modification at its own risk, but without prejudice to the right of the plaintiffs to move the court to enjoin the proposed modification as inconsistent with the terms of this Consent Decree, and to seek full and complete relief for persons harmed by the changes, and any other appropriate relief authorized by the Fair Housing Act.

Consent Decree, ¶ 6(b). This language permits plaintiffs to seek relief for persons other than and in addition to those who may have been claimants affected by NYCHA's past discrimination.

Unlike other portions of the Consent Decree, which "sunset" after a period of time, the permanent injunctive portions of the Decree have no sunset date. Paragraph 50 of the Consent Decree provides:

> With the exception of the permanent injunctive provisions, this Consent Decree shall be dissolved eight years and six months after the date of entry.

Therefore, as these provisions make clear, changes to the TSAP that violate Title VI and the Fair Housing Act

may be enjoined, and the Court may order any other relief authorized by those statutes, even after victim-relief at the Affected Developments expires. Paragraph 4 (j) of the Consent Decree states that the permanent injunctions may not be construed so as to bar relief for persons "who do not receive relief under this Consent Decree."

The permanent injunctions in ¶ 4 apply not just to the 31 Affected Developments listed in Exhibit A to the Consent Decree—and, as noted, not just to "Conventional Public Housing" as defined in ¶ 1(h)—but to all NYCHA housing, "conventional or otherwise." If NYCHA were correct that TSAP changes causing increases in segregation are not actionable after victim-relief at the Affected Developments ends, then the extension of the injunction beyond the Affected Developments to all NYCHA housing, "conventional or otherwise," would be meaningless.

Paragraph 6(b) of the Consent Decree authorizes the plaintiffs to seek "full and complete relief" for persons harmed by changes to the TSAP that violate the Fair Housing Act. If the Court could not find that increases in segregation caused by changes to the TSAP violate the Fair Housing Act after victim-relief ends, as NYCHA claims, then ¶ 6(b) would be extraneous, since the Court could not order full and complete relief once victim-relief ended. The completion of victim-relief at some Affected Developments has no bearing on whether a TSAP change that increases segregation in NYCHA's projects are actionable under the Consent Decree.

NYCHA attempts to conflate relief for identified victims of discrimination with relief designed to effect desegregation. However, victim relief and relief intended to eradicate segregation stand on different footings. A preference based on race to identified victims of

discrimination is always a permissible equitable remedy. As the Ninth Circuit has stated, "when . . . a state gives the identified victims of state discrimination jobs or contracts that were wrongly denied them, the beneficiaries are not granted a preference 'on the basis of their race' but on the basis that they have been individually wronged." *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 700 n.7 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997); *see also City of Richmond v. J.A. Croson CO.*, 488 U.S. 469, 526 (1989) (Scalia, J. concurring) ("Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified on the basis of their race.").

By contrast, race-conscious relief designed to eradicate the effects of past segregation is permissible under both Title VII,[13] *see Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 516 (1986), and the Fourteenth Amendment, *see Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 287 (1986) (O'Connor, J., concurring), even if the relief benefits a class that includes non-victims, so long as it is narrowly tailored to serve a compelling state interest. *See Milliken v. Bradley*, 418 U.S. 717 (1974); *United States v. Yonkers Board of Educ.*, 837 F.2d 1181, 1236 (2d Cir. 1987). The predicate for this type of relief is that past segregation actually affected the class of persons to whom the relief runs, even if the class includes persons who are not themselves victims of discrimination. *See e.g.*, *Local No. 93*,

[13] Title VII and Title VII "are part of a coordinated scheme of federal civil rights laws enacted to end discrimination; the Supreme Court has held that both statutes must be construed expansively to implement that goal." *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d. Cir.) (noting relevance of Title VII case law to Title VIII cases), *aff'd*, 488 U.S. 15 (1988).

478 U.S. at 516 ("It is equally clear that the voluntary action available to employers *and unions seeking to* eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination.") (*citing Steelworkers v. Weber*, 443 U.S. 193, 61 L. Ed. 2d 480, 99 S. Ct. 2721 (1979)).

The Consent Decree in this case incorporates both forms of relief. The injunctive provisions of ¶¶ 4-8 are intended to eradicate the effects of past segregation at NYCHA's projects, "conventional or otherwise." The beneficiaries of the permanent injunctions include both victims and non-victims of discrimination. The victim-specific relief provisions, in contrast, are intended to afford relief to actual victims of discrimination at 31 designated Affected Developments.

Given that the Consent Decree adopted a comprehensive package of remedies designed to correct segregation that occurred over decades, it is premature to assume that segregation has been eliminated by compliance with one aspect of the Decree. *See Board of Education v. Dowell*, 498 U.S. 237, 249-50 (1991) (in the school desegregation setting, a court should consider whether the system has complied in good faith with the decree, and whether, looking at every facet of school operations, the vestiges of past discrimination have been eliminated to the extent practicable). There are grounds, therefore, to consider the position of the Davis Plaintiffs that the WFP significantly perpetuates segregation.

III. *The WFP Will Significantly Perpetuate Segregation at the Affected Projects*

An action that perpetuates existing patterns of segregation violates the Fair Housing Act. *See Huntington*, 844 F.2d at 937 (*citing Metropolitan Housing Develop-*

ment Corp. v. Village of Arlington Heights, 548 F.2d 1283, 1290 (1989). The determinative issue here is whether the proposed WFP will "*significantly* perpetuate segregation at the relevant NYCHA developments." *Davis IV*, 166 F.3d at 438. While the parties disagree somewhat on the methodology employed and the accuracy of the statistics presented by the experts, the real quarrels in this action are legal. Specifically, the NYCHA asserts that even accepting *arguendo* Dr. Cupingood's figures, the projected effect of the WFP is *de minimis*. Plaintiffs counter that the WFP would "severely impair" desegregation at the 21 Disproportionate Projects, and that the impact would be "significant" whether measured in absolute numbers or by standard statistical tests.

A. *The Appropriate Comparison Group*

As this Court has stated, "[a]lthough discriminatory effect is generally shown by statistical evidence, any statistical analysis must involve the appropriate comparables." *Davis II*, 1997 WL 407250 at *6 (*quoting Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development*, 56 F.3d 1243, 1253 (10th Cir. 1995)). NYCHA submits that Plaintiffs err in comparing (1) the projected percentage of white families at the Disproportionate Projects if the original TSAP, which does not have a WFP, were employed for the next ten years with (2) the projected percentage of white families at the at the Disproportionate Projects employing the WFP under the current TSAP over the same period. NYCHA notes that in rejecting Plaintiffs' claims that the WFP would have a disparate impact on minorities, this Court found it inappropriate to compare projected results under the old and new TSAP systems and that the proper comparables are the racial composition of the qualified

applicant pool with the projected effects of the WFP. *See Davis II*, 1997 WL 407250 at *6-10. Thus, NYCHA concludes that the correct standard against which the projected effect of the WFP should be measured is the racial composition of the actual tenant population at each of the projects.

NYCHA's position, however, is contrary to Supreme Court precedent. Where a court-ordered plan intended to eradicate past segregation is in effect, and where, as here, a proposed change to the plan is alleged to perpetuate past segregation, the Supreme Court has compared the results under the proposed plan with those under the original, court-ordered plan.[14]

Several school-desegregation cases are illustrative. In *Wright v. Council of the City of Emporia*, 407 U.S. 451, (1972), for example, the district court ordered Greensville County, Virginia to implement a desegregation plan. After the district court issued its order, the City of Emporia, located within Greensville County, implemented plans to operate a separate school system, and parents in Greensville County were invited to send their children to the Emporia schools. In affirming the district court's injunction barring the change because it would impede or delay desegregation, the Supreme Court compared what would have been obtained under the court-ordered plan to the new plan. *See* 407 U.S. at 457-58 (comparing

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[14] Conventionally, the *adverse impact* of an applicant selection process in housing and employment cases is determined by whether minority applicants are chosen at a rate lower than their proportional representation in the overall applicant pool. *See, e.g., United States v. Starrett City Assocs.*, 840 F.2d 1096, 1099 (2d Cir. 1988). The query here, however, is not whether the WFP would have an adverse impact on minority applicants, but whether it will significantly perpetuate segregation. Accordingly, a different basis of comparison is employed.

statistics contemplated by the desegregation decree with those contemplated by the change).

Similarly, in *United States v. Scotland Neck City Board of Educ.*, 407 U.S. 484 (1972), the county of Halifax, North Carolina reached an agreement with the United States regarding a so-called "Interim Plan" to eradicate past segregation. After the Interim Plan had been submitted to the school board, but before a vote could be taken, the North Carolina Legislature enacted a bill permitting the City of Scotland Neck to establish a separate school system. Sustaining the district court's preliminary injunction against the change because it would impede desegregation, the Supreme Court compared projected enrollments under the Interim Plan with those under the challenged plan. *See* 407 U.S. at 489-90 (comparing enrollment under Interim Plan with that under challenged plan).

Accordingly, in evaluating whether the WFP significantly perpetuates segregation, the relevant comparison will be the desegregation that would be achieved under the original TSAP with the projected effect of the WFP.

B. *White Decline Under the WFP*

NYCHA contends that so long as the white occupancy rates would decline under the WFP, regardless of the rate of decline, then the WFP cannot be said to perpetuate segregation. (*See* Peterson Third Aff. ¶¶ 7 and 23(a)). Plaintiffs assert that this position makes "little sense" and offer the following example:

> Assume hypothetically that the current racial composition of Project X is 50 percent white and that all projects more than 30 percent white reflect the vestiges of past segregation. Also assume that without the WFP, the percent [of] white[s] at Project X will decline by 4 percent per year, and would thus reach

> 30 percent white in five years. Finally, assume that under the WFP, the percent white would decline by only 1 percent per year and would thus reach 30 percent white in 20 years. Dr. Peterson would claim that the WFP did not perpetuate segregation because the percent white at Project X would still decline under the WFP, no matter how slowly. He would dismiss as irrelevant the fact that the vestiges of segregation would persist for an additional 15 years. But "perpetuate" means to extend in time.

(Cupingood Fourth Aff. ¶ 8).

The relevant inquiry here is not whether desegregation will occur *eventually*, but whether the WFP will significantly delay desegregation at the Disproportionate Projects. *See Monroe v. Board of Commissioners*, 391 U.S. 450, 459 (1968) ("if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable."); *Wright*, 407 U.S. at 460 ("if the proposal would impede the dismantling of the dual system, then the district court . . . may enjoin it from being carried out").[15]

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[15] Many courts have enjoined practices that impede or delay segregation. Injunctions against these practices frequently arise in employment discrimination cases where the challenged practice impedes hiring or promotions necessary to effectuate integration of the workforce. *Sarabia v. Toledo Police Patrolman's Ass'n*, 601 F.2d 914 (6th Cir. 1979) is illustrative. In *Sarabia*, a consent decree had been adopted "to erase any vestiges of past employment discrimination" in the Toledo police force. 601 F.2d at 915. After three and one-half years of operation under the decree, the percentage of African-Americans on the police force increased from 7 percent to only 8.4 percent, although the population of Toledo was approximately 14 percent African-American. The plaintiffs charged that a civil service hiring rule, the so-called "rule of three," was impeding desegregation of the police force. Concluding that the hiring rule delayed the elimination of the vestiges of past employment dis-

As noted, this Court has adopted Dr. Cupingood's conclusion that:

> assuming that existing turnover and move-in rates persist and that for each vacancy set aside for claimants under the *Davis* decree, a family of color would replace a white family, implementation of the Working Family Preference would effectively "freeze" the desegregation process at the racially identifiable projects, in violation of Title VIII. . . . . The Working Family Preference will have this effect because it will more than double white admission rates[16] and because existing trends

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crimination, the Sixth Circuit sustained the district court's order suspending the civil service rule. *Id.* at 619. Notably, it was no defense that the percentage of whites on the force was slowly declining even with the challenged rule in place. *See also Glass City Black Brothers United v. Neeb*, 540 F. Supp. 852 (N.D. Ohio 1982); *cf. Arthur v. Nyquist*, 712 F.2d 816 (2d Cir. 1983).

[16] In his affidavit dated June 22, 1999, Defendants' expert asserts that if the Court's injunction had not been in place during 1998, the number of whites admitted to NYCHA's public housing would have climbed "only to 6.48%" [from 4.2 percent] rather than 9.9 percent as Dr. Cupingood originally predicted. However, in addition to a number of other errors, Dr. Peterson did not account for the fact that several thousand families who moved into NYCHA housing during 1998 were selected for interviews and/or certified to project waiting lists before the WFP went into operation. Because families selected under the old TSAP are still working their way through the "pipeline," the white admission rate in 1998 was significantly lower than would have occurred if all families had been selected for interviews and certified pursuant to the WFP. Moreover, Dr. Petersons' conclusion is based on an under-representation of 1998 move-ins. Significantly, even accepting Dr. Peterson's methodology, and adjusting only for the undercount of families to the 21 projects, one obtains s corrected figure of 8.53 percent white among families who were placed in 1998 and were "allegedly untainted by the Pipeline Effect" (Cupingood Sixth Aff. ¶ 9).

demonstrate that many of these additional white families will be concentrated in predominantly white developments.

Davis II, 1997 WL 407250 at *12.

C. *The Impact of the WFP on Desegregation is Statistically and Legally Significant*

"Statistical significance" measures whether a particular phenomenon is the cause of a specific set of effects. *See Ottaviani v. State Univ. at New Paltz*, 875 F.2d 365, 371 (2d Cir. 1989). "Legal significance," by contrast, measures whether, assuming the phenomenon was the cause of those effects, those effects have any legal import. *See Thomas v. Metroflight, Inc.*, 814 F.2d 1506, 1511 n.4 (10th Cir. 1987).

1. *Statistical Significance*

After performing a rigorous statistical analysis,[17] detailed above, Dr. Cupingood concluded that the reduction in desegregation caused by the WFP would be statistically significant at every disproportionate project.

A standard tool for assessing statistical significance is the two-standard deviation test. The test is used to determine whether a deviation from the expected norm is small enough to be attributable to chance, or so large that random chance could not reasonably account for the outcome. "The greater the number of standard deviations, the less likely it is that chance is the cause of any

[17] Defendants suggest that Dr. Cupingood's projections are unreliable in that his calculations are subject to uncertainties involving certain variables such as turnover rates, applicant pool composition, and project selection probabilities. While projections about the future, are by definition, subject to some uncertainty, Dr. Cupingood has taken reasonable steps, such as the use of historical averages, to minimize the impact of possible uncertainties.

difference between the expected and observed results." *Ottaviani*, 875 F.2d at 371.[18] Courts have frequently adopted a standard of two to three standard deviations as constituting statistical significance. *See Hazelwood School District v. United States*, 433 U.S. 299, 311 n.17 (1977) ("if the difference between the expected value and observed number is greater than two or three standard deviations, then the hypothesis that employees were hired without regard to race would be suspect."); *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977).

In this case, the measured values are the differences between the white move-ins at the Disproportionate Projects with and without the WFP for various time periods (five and ten years). Dr. Cupingood's report indicates those differentials, both in magnitude and in terms of standard deviation units, for the five-year and ten-year time periods. For the five year-period, and assuming historical turnover trends for each race, the WFP would result in a total of approximately 1,139 white move-ins at the Disproportionate Projects, as compared to only 625 without the WFP. The difference between these figures—some 514 excess white move-ins—represents 15.39 standard deviation units and is highly significant.[19]

Statistical significance can also be analyzed at the project level. Dr. Cupingood's report shows that after five years, 18 of the 21 Disproportionate Projects would have statistically significant white move-in differential caused

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[18] For example, a disparity of two standard deviations corresponds to a five-percent probability that the observed outcome is random, while a disparity of three standard deviations corresponds to a 0.3 percent probability that the observed outcome could be attributable to chance.

[19] Over ten years, assuming historical turnover rates for each race, the WFP would increase white move-ins from 1,217 to approximately 2,240—an increase of 1,023 white move-ins. The difference represents 21.92 standard deviation units.

by the WFP. At the ten year mark, again using historical turnover rates for each race, 20 of the 21 Disproportionate Projects would have statistically significant reductions in desegregation. At Holmes Towers, for example, the WFP would result in approximately 75 white move-ins as opposed to 34 without the WFP, a disparity representing 4.3 standard deviation units. At Pomonok, there would be approximately 287 white move-ins with the WFP and 138 without the WFP in place, a difference constituting 8.21 standard deviation units. (*See* Cupingood Fourth Aff. Table 12).

Defendants claim that "it is apparent that the number of whites had already fallen below Dr. Cupingood's projected post-Davis numbers at 14 out of the 21 projects," (Peterson Third Aff. ¶ 19), and assert that Plaintiffs have overestimated white population declines under the WFP. However, this contention is erroneous. When Dr. Cupingood prepared his report, the most recently available Tenant Statistics by Race report was for June 30, 1998. (*See* Cupingood Third Aff. ¶ 7). At each Disproportionate Project that was also a *Davis* Affected Development, Dr. Cupingood adjusted the number of whites indicated on the June 30, 1998 report downward to reflect all future *Davis* claimant move-ins. (*See id.* ¶¶ 7-8). Dr. Peterson compared those adjustments to the actual changes in the white population caused by *post*-June 30 activity. (*See* Peterson Third Aff. ¶¶ 15-17). Thus, Dr. Peterson compared two completely unrelated figures: (1) the adjustment to account for housing of all future *Davis* claimants prior to any post-June 30, 1998 activity; and (2) the figure for actual changes in the white population caused by post-June 30 activity, but prior to housing all *Davis* claimants. This comparison is meaningless.

Accordingly, the reduction in desegregation caused by the WFP is statistically significant.

2. *Legal Significance*

While statistical significance is necessary to establish legal significance, it is not sufficient. It must thus be determined whether the statistically significant difference occasioned by the WFP is of ample magnitude to be of practical importance. This, of course, is a value judgment. There is no bright line rule for assessing whether the perpetuation of segregation is legally significant.

NYCHA contends that the WFP's effect on white population decline is too minor to be characterized as significant and do not outweigh the WFP's undisputed salutary effects. According to Dr. Cupingood, for 13 of the 21 projects, the difference in white decline with the WFP in effect over five years would be 4 percent or less. At the remaining eight projects, the difference in white decline ranges from 5.4 percent to 10.7 percent. Citing such cases as *Huntington*, 844 F.2d at 934, and *Metropolitan Housing*, 558 F.2d at 1291, NYCHA concludes that "federal courts have much larger discrepancies in mind when they speak of 'legally significant' effects than the few percentage-point differences involved here." (Defendants' Brief at 21).

While the Authority is correct that many of the cases cited by the parties involve larger discrepancies than in the instant case, "small" percentage-point differences can result in significant perpetuation of segregation. At the Pomonok project, for example, where the WFP would increase the white occupancy rate by 3.2 percentage points after five years, and 5.5 percentage points after ten years, (*see* Cupingood Third Aff. Tables 4 and 6), every percentage point increase in the white population means relinquishing 20 apartments to white fam-

ilies that would have gone to African-American and Hispanic families. At Pomonok alone, the WFP would deprive non-white families of 66 apartments after five years (*see id.* Table 5) and 114 apartments after ten years (*see id.* Table 7).

The cumulative effect of the WFP on the Disproportionate Projects is particularly striking. After five years, there would be approximately 514 additional white families at these 21 projects, and after ten years there would be more than 1,023 white families.[20]

These figures are significant in sheer magnitude. *See Sarabia*, 601 F.2d 914. Perhaps more importantly, they are significant to the families affected. To be sure, the WFP has numerous benefits, but with respect to the Disproportionate Projects, these are outweighed by its adverse effects.[21] The WFP markedly inhibits the rate at which desegregation will occur, adversely affects the ratios at the Disproportionate Projects, and contravenes

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[20] The extent to which the WFP would impair desegregation can also be measured by the percentage by which the WFP would reduce changes in white population. For example, at Robbins Plaza, without the WFP in place and assuming that historical turnover rates by race continue, the white population after five years would fall by 16 families. With the WFP, it would fall by only two families, a difference of 87.5 percent. (*See* Cupingood Third Aff. ¶ 15).

[21] NYCHA asserts that this Court's injunction has caused increases in the number of homeless and very poor families at the Disproportionate Projects. The WFP went into operation in 1998 except at the Disproportionate Projects where is was enjoined. According to NYCHA's most recent data book, during 1998, the number of families at the Disproportionate Projects on "full welfare" decreased by 271 families, from 11.3 percent to 9.3 percent of the population. The number of families in which at least one family member receives welfare decreased by 313 families. Significantly, the number of families at the Disproportionate Projects is markedly lower than in NYCHA's system as a whole. (*See* Cupingood Fourth Aff. ¶ 28).

the purposes of the Consent Decree. In short, the WFP significantly perpetuates segregation.

Accordingly, the NYCHA is enjoined from implementing the WFP at the 20 relevant developments.[22]

Conclusion

For the reasons set forth above, the motion of the Davis Plaintiffs is granted and the preliminary injunction is made permanent. The NYCHA's motion is denied.

It is so ordered.

New York, N. Y.
August 11, 1999

ROBERT W. SWEET
ROBERT W. SWEET
U.S.D.J.

[22] As noted, there are now 20 out of the NYCHA's 322 projects subject to this Court's injunction.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: October 8, 1998 Decided: January 22, 1999)

Docket No. 97-9006

PAULINE DAVIS & CYNTHIA WILLIAMS,

Plaintiffs-Appellees,

BLANCA IRIS HERNANDEZ, GINA CAMPBELL, and JEANNETTE VARGAS, on behalf of themselves and all others similarly situated,

Intervenors-Plaintiffs-Appellees,

—v.—

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Appellant.

Before:

PARKER and SACK, *Circuit Judges*,
and SEAR, *Chief Judge*.*

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* The Honorable Morey L. Sear, Chief Judge of the United States District Court for the Eastern District of Louisiana, sitting by designation.

Defendant-appellant New York City Housing Authority ("NYCHA") appeals from two orders of the United States District Court for the Southern District of New York (Robert W. Sweet, Judge), entered on July 18, 1997 and November 13, 1997, granting plaintiffs-appellees' application for a preliminary injunction. The district court barred defendant-appellant from modifying a Tenant Selection and Assignment Plan ("TSAP") to implement a working family preference at 21 NYCHA developments where white families comprise more than 30% of the tenant population.

We vacate and remand.

HENRY SCHOENFELD, New York, NY (New York City Housing Authority, New York, NY), for *Defendant-Appellant*.

SCOTT A. ROSENBERG, New York, NY (The Legal Aid Society, Civil Appeals and Law Reform Unit, New York, NY), for *Plaintiffs-Appellees*.

SEAR, *Chief Judge*:

I. BACKGROUND

On July 1, 1992, plaintiffs, Latino and African American individuals residing in or eligible for New York City Housing Authority ("NYCHA") housing ("the Davis plaintiffs"), the United States, and NYCHA signed a Consent Decree to resolve two actions alleging that NYCHA had engaged in discrimination in the selection

and assignment of public housing tenants in violation of various federal statutes.[1] The Decree provides, inter alia, for: (1) injunctive relief barring future housing discrimination on the basis of race, color or national origin; (2) the implementation of a new Tenant Selection and Assignment Plan ("TSAP") that substantially revises NYCHA's tenant selection and assignment systems and which prohibits further discrimination; (3) remedial relief for approximately 2,000 Latinos and African Americans who were denied public housing between 1985 and 1990 based on race; and (4) significant record keeping and reporting by NYCHA concerning tenant selection and assignment practices.[2]

The TSAP created under the Decree and currently in place incorporates a three-stage process for selecting applicants for vacancies in NYCHA housing. During the first stage, applicants are selected for eligibility interviews from an applicant pool. NYCHA assigns priority codes to each application, based on various federal priorities[3] and local preferences. Applicants with a certain priority code are then interviewed, at which time they are asked to state their preference as to a borough or project. Typically, approximately 15% of applicants reach the interview stage.

The second stage of the process entails placing interviewed individuals on waiting lists for vacancies.

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[1] Plaintiffs alleged violation of the Fair Housing Act, 42 U.S.C. § 3601; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and 42 U.S.C. §§ 1981, 1982 and 1983.

[2] Joint Appendix at 14 *et seq.*

[3] The federal preferences include, *e.g.*, preferences for applicants who are involuntarily displaced from their dwellings, live in substandard housing, or pay more than 50% of their income in rent.

During the final stage, applicants on waiting lists are chosen to fill vacancies as they arise. In order to achieve an income mix, the primary consideration in selecting tenants is the applicant's "income tier." Tier I families have the lowest incomes, while Tier III families have the highest incomes. Under the current TSAP, NYCHA attempts to rent 25% of all vacancies to Tier III families, 37.5% to Tier II families and 37.5 % to Tier I families.

The selection protocol currently used to achieve this income mix is as follows: the first vacancy is offered to the Tier III applicant with the highest priority (e.g. local and federal priorities) and oldest date of certification; the second vacancy is offered to the Tier II applicant with the highest priority and oldest date of certification; the third vacancy is offered to the Tier I applicant with the highest priority and oldest date of certification; and the sequence is repeated until 25% of the expected annual vacancies are filled with Tier III families, then the remaining vacancies are available only for Tier I and II applicants.

Ten years ago, nearly half of all families living in NYCHA developments were working families, whereas today fewer than one third are employed. It is undisputed that unless a higher proportion of applicants with higher incomes receive rentals, the stability of the projects will be jeopardized. In 1995 NYCHA proposed to the United States Department of Housing and Urban Development ("HUD") two changes to the TSAP: (1) implementation of a preference for working families and (2) extension to larger families a limited choice of the project as opposed to the borough in which they wish to reside. Only the first change, the "working family preference," is at issue in these proceedings.

NYCHA proposed implementing the working family preference through the TSAP as follows: first, NYCHA

would use all of its local preferences (up to 50% of all rentals) to give first priority to Tier III families, second priority to Tier II families, and last priority to Tier I working or disabled families. Second, for those who already qualify for federal preferences, NYCHA would provide another priority to working families.

On November 15, 1996, the Davis plaintiffs filed a motion in district court to enjoin NYCHA from implementing the proposed changes to the TSAP. Over the next six months, Judge Sweet accepted numerous written submissions from the parties and, on one occasion, heard oral argument. By Opinion and Order dated July 17, 1997, Judge Sweet permitted NYCHA to implement the "project choice" modification to the TSAP, but enjoined NYCHA from implementing the working family preference. *Davis v. New York City Housing Authority*, 1997 WL 407250 (S.D.N.Y. July 18, 1997) (Sweet, J.). Judge Sweet rejected plaintiffs' argument that the working family preference as proposed by defendant would have a disparate impact on plaintiffs, but found that it was likely that plaintiffs could show that the plan would perpetuate segregation at 11 developments, and therefore enjoined implementation of the preference at *all* 322 NYCHA developments. *Id.* at *12.

NYCHA filed a notice of appeal and moved for reconsideration in district court. On November 13, 1997, Judge Sweet denied NYCHA's motion on grounds that the arguments were not properly advanced on reconsideration, but narrowed the prior ruling to enjoin the working family preference at only 21 NYCHA developments, at which white families currently constitute more than 30% of the tenant population. *Davis v. New York City Housing Authority*, 1997 WL 711360 (S.D.N.Y. November 13, 1997) (Sweet, J.). NYCHA filed another notice of appeal.

On appeal, NYCHA seeks to overturn the preliminary injunction on various grounds, including that the court's findings on the issue of perpetuation of segregation were vague, conclusory and unsupported.

II. DISCUSSION

We review for abuse of discretion a district court's grant of a preliminary injunction. *Suffolk Parents of Handicapped Adults v. Wingate*, 101 F.3d 818, 822 (2d Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1843, 137 L.Ed.2d 1047 (1997). However, we turn first to NYCHA's contention that the preliminary injunction is *procedurally* flawed, that is, that the finding regarding perpetuation of segregation lacked sufficient detail to serve as a basis for reasoned appellate review.

Federal Rule of Civil Procedure 52 (a) requires that in granting or refusing interlocutory injunctions, the court shall set forth the findings of fact and conclusions of law which constitute the grounds of its action. Fed.R.Civ.P. 52 (a); *Inverness Corp. v. Whitehall Laboratories*, 819 F.2d 48, 49 (2d Cir. 1987). The rule serves several purposes. First, it aids the appellate court in understanding the ground or basis for the trial court's decision. *Id.* (citations omitted). "It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52 (a) of the Rules of Civil Procedure." *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316, 60 S.Ct. 517, 520, 84 L.Ed. 774 (1940).

Second, the rule encourages the trial judge to ascertain the facts with due care and render a decision in accord with the evidence and the law. *Inverness*, 819 F.2d at 50. What is adequate to serve these two purposes depends on

the importance of an issue, its complexity, the depth and nature of the evidence presented, and similar elements that may vary from case to case. *See Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 420-22, 63 S.Ct. 1141, 1144-45, 87 L.Ed. 1485 (1943); *Knapp Shoes, Inc.v. Sylvania Shoe Manufacturing Corp.*, 15 F.3d 1222, 1228-29 (1st Cir. 1994); 9A C. Wright and A. Miller, *Federal Practice and Procedure* § 2579 (2d. ed. 1995).

In finding that it was likely that plaintiffs would be able to show that the proposed TSAP would have a discriminatory effect by perpetuating segregation in NYCHA developments, Judge Sweet first outlined the record evidence of a history of segregation. *Davis v. NYCHA*, 1997 WL 407250 at *11. He then defined segregation in public housing as existing "if housing projects are significantly out of racial balance," or "predominantly white," and noted that under the current TSAP, projects are considered racially imbalanced if "more than 30% white." *Id.* at *12. He then found that eleven NYCHA projects remained over 50% white and were out of racial balance due to past segregation. *Id.* Finally, he found that the proposed TSAP would perpetuate segregation at certain NYCHA developments. *Id.* It is this ultimate finding that defendant attacks as insufficient.

In the challenged portion of his Opinion, Judge Sweet found that

> assuming that existing turnover and move-in rates persist and that for each vacancy set aside for claimants under the Davis decree, a family of color would replace a white family, implementation of the Working Family Preference would effectively 'freeze' the desegregation process at the racially identifiable projects, in violation of Title VIII. Specifically, the Working Family Preference would

> reverse the desegregation process at four of the eleven majority-white projects, there would be no further desegregation at another four, and desegregation would be slowed significantly at three other projects . . . . [It] will have this effect because it will more than double white admission rates and because existing trends demonstrate that many of these additional white families will be concentrated in predominantly white developments.

Id. On this basis, he enjoined use of the proposed TSAP at all 322 NYCHA developments. On reconsideration, he relied on this same finding to modify his original order to apply to 21 developments where whites currently constitute more than 30% of the tenant population, including the eleven developments covered by the original injunction and 10 additional developments about which plaintiffs' expert had offered no opinion. *Davis*, 1997 WL 711360 at *4.

In view of the importance of the issue and the importance of NYCHA's interest in the viability of its system, we consider Judge Sweet's findings on the issue of perpetuation of segregation insufficient under Rule 52 (a). While not entirely devoid of detail, Judge Sweet failed to adequately explain the subsidiary facts and methodology underlying the ultimate finding. For instance, Judge Sweet refers to "existing trends demonstrat[ing] that many of the[ ] additional white families [admitted under the proposed modification] will be concentrated in predominantly white developments," but does not discuss or attempt to explain these trends or the data reflecting them. He also fails to address the time period during which the purported impact of the proposed TSAP was assessed and/or how future "trends" might affect application of the TSAP to developments that are not currently, but subsequently become, predominantly

white. Further, while he focuses on the racial imbalance the proposed TSAP will cause at specific developments within the NYCHA system,[4] he does not identify them by name[5] or state the number, fraction or percentage of additional white families who will be admitted to each of the 21 developments as a result of the proposed TSAP.

Of course, we may proceed with appellate review despite inadequate findings if we are able to discern enough solid facts from the record to permit us to render a decision. *Tekkno Laboratories, Inc. v. Perales*, 933 F.2d 1093, 1097 (2d Cir. 1991).

Judge Sweet states that he credited the opinion of plaintiffs' expert, Dr. Leonard Cupingood. Indeed, he adopted Paragraph 13 of Dr. Cupingood's Second Affidavit almost verbatim. In that paragraph, Dr. Cupingood stated that

> I was also asked to calculate the effect that the proposed changes to the TSAP would have on slowing down the desegregation in projects which were more than 50 percent white as of June 1996. Information supplied to me indicated that the following 11 projects were more than 50 percent white as of June 1996—Berry, Cassidy-Lafayette, Forest Hills, Independence, Middletown Plaza, New Lane, Robbins Plaza, South Beach, Taylor-Wythe, Todt-Hill, and Williams. Some of these projects are affected

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[4] Judge Sweet rejected defendant's argument that perpetuation of segregation should be assessed on a system-wide as opposed to a unit-by-unit basis. 1997 WL 407250 at *14. That aspect of the Judge's ruling is not before us on appeal.

[5] Although Dr. Cupingood identified these as Berry, South Beach, Todt Hill, Cassidy-Lafayette, New Lane, Robbins Plaza, Middletown Plaza, Forest Hills, Taylor-Wythe Houses, Independence Towers, and Jonathon Williams, he likewise did not correlate each one with a specific effect.

> by the Davis Consent Decree. For these "Davis" projects, I first conservatively assumed that all units set aside for Davis tenants would represent replacements for white tenants. Then, assuming the turnover rates and move-in rates from Appendix E of [NYCHA expert] Dr. Peterson's affidavit continued and that the proposed changes to the TSAP were adopted, I calculated that a) there would be no further desegregation at four of the projects, b) the desegregation would be reversed at four other projects, and c) the desegregation would be slowed significantly at three projects. Thus, adoption of the proposed changes to the TSAP would adversely affect the desegregation at these majority white projects.[6]

This paragraph raises more questions than it answers. As an initial matter, it is unclear to which proposed change—project choice or working family preference, or both—plaintiffs' expert attributes the perpetuation of segregation. Plaintiffs' expert begins by stating that he was asked to calculate the effect "the proposed **changes**" would have in slowing down desegregation in developments with white populations exceeding 50%.[7] The conclusion portion, however, fails to link each proposed modification to a purported effect.

The vagueness of Paragraph 13 on the issue of the segregative effect of the working family preference is further highlighted by the specificity of the expert's opinion concerning the impact of project choice. While Paragraph 13 of the Second Affidavit only vaguely discusses the effect of the working family preference, Para-

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[6] JA 484.

[7] *Id.* (emphasis added).

graph 14 specifies the exact effect project choice will have on NYCHA developments. Correspondingly, Judge Sweet's findings on project choice are much more detailed. *Compare Davis,* 1997 WL 407250 at *17[8] with *Davis*, 1997 WL 407250 at *12, cited in pertinent part hereinabove.

Another difficulty with plaintiffs' expert's opinion is that he identifies his source of statistics generally as Appendix E of NYCHA's expert's report, which consists of data compiled by NYCHA, but does not cite to any precise numerical data underlying his opinion. His only other reference to data in Paragraph 13 is to "[i]nformation supplied to me."[9] Plaintiffs' counsel has attempted, both in the district court and on appeal, to explain the subsidiary facts and methodology relied on by plaintiffs' expert in reaching the ultimate opinion. Among other things, plaintiffs' counsel has argued that it is a matter of "simple arithmetic and common sense."[10] Neither common sense nor anything plaintiffs' counsel has offered to date, however, elucidates Paragraph 13 enough to enable us to conduct a meaningful review. In

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8 "According to plaintiffs' own expert, only seventeen additional white families would be eligible for Project Choice under the proposed TSAP, and of those only 8.3 would move into developments that are more than 10% white. This is a tiny fraction of the 1,885 three- and four-bedroom apartments rented by NYCHA in 1995. The eight additional families are also dwarfed by the 880 white families per year leaving projects that are over 30% white and the 800 white families per year leaving projects that are over 10% white. Plaintiffs have not produced any evidence that the 'influx' of eight additional white families will have any significant effect on the process of desegregation at any of these 'white' projects, as they have with the Working Family Preference." *Id.*

9 JA 484.

10 *See, e.g.*, JA at 715.

any event, plaintiffs' expert, not plaintiffs' counsel, is the proper person to explain his methodology.

We are persuaded that plaintiffs' expert's opinion was so vague and conclusory as to preclude defendant from effectively challenging the accuracy of the opinion and to preclude Judge Sweet from being able to specify the subsidiary facts underlying the ultimate finding of perpetuation of segregation. Because we are unable to discern the relevant matters from the record, we are unable to make a reasoned determination of whether Judge Sweet's finding of perpetuation of segregation in the system was "clearly erroneous." We therefore remand for proceedings consistent with this opinion.

Defendant has not appealed on grounds that Judge Sweet failed to conduct an evidentiary hearing,[11] but it appears from the record that, in making his findings, Judge Sweet relied solely on the experts' affidavits. We note for purposes of remand that while affidavits may be considered on a preliminary injunction motion, motions for preliminary injunction should not be resolved on the basis of affidavits that evince disputed issues of fact. *Forts v. Ward*, 566 F.2d 849, 851 (2d Cir. 1977). When a factual issue is disputed, oral testimony is preferable to affidavits. *Id.*; *Schultz v. Williams*, 38 F.3d 657, 658 (2d Cir. 1994).

NYCHA also contends that Judge Sweet abused his discretion when, in ruling on NYCHA's motion for reconsideration, he rejected NYCHA's argument that any effect the proposed TSAP had on desegregation was *de minimis*. Considering that NYCHA had filed a notice of appeal prior to seeking reconsideration, it appears questionable whether Judge Sweet had jurisdiction to con-

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[11] This is probably because the parties chose to rely solely on written evidence.

sider the motion. In any event, in view of our decision to remand for further proceedings, we need not address this issue other than to state that we consider it in the interest of justice that the court thoroughly address any arguments NYCHA offers to demonstrate that the proposed working family preference would, of itself, have only a *de minimis* segregative effect on the NYCHA system. The proper standard to be applied on remand is whether the proposed use of the working family preference will *significantly* perpetuate desegregation at the relevant NYCHA developments. *Gilmore v. City of Montgomery*, 417 U.S. 556, 568 (1974); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir.), *aff'd*, 488 U.S. 15 (1988).

We leave the preliminary injunction intact until the district court has had the opportunity to address these matters on remand. *Inverness*, 819 F.2d at 51.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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90 Civ. 628 (RWS)

PAULINE DAVIS, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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92 Civ. 4873 (RWS)

UNITED STATES OF AMERICA,

Plaintiff,

—against—

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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OPINION

Sweet, D.J.

Defendants, The New York City Housing Authority ("NYCHA"), have moved for reconsideration and reargument of that portion of the Court's July 17, 1997 decision that preliminarily enjoined NYCHA from amending its Tenant Selection and Assignment Plan (the "TSAP") to implement a working-family preference ("WFP") as proposed. Defendants seek either (1) an order vacating the preliminary injunction; or (2) an order vacating the injunction as it applies to all developments, except those 11 at which Plaintiffs claim the WFP would perpetuate segregation. Furthermore, NYCHA and Plaintiffs have submitted an Order for Settlement and a Counter-Proposed Order, pursuant the Court's Opinion. For the reasons set forth below, the motion to reconsider is denied. The preliminary injunction is modified to the extent that (1) NYCHA may implement the working-family preference as proposed in any project where white families do not constitute more than 30 percent of the families at the project; and (2) NYCHA may extend limited project choice to families requiring three or four-bedroom apartments. NYCHA is granted leave to move to modify the preliminary injunction consistently with this opinion and upon any further showing of good cause.

The Parties

NYCHA is the largest public housing agency in the United States, operating more than 320 projects, comprising approximately 180,000 apartments which house nearly 500,000 people. NYCHA operates these projects pursuant to an Annual Contributions Contract and other agreements with the Department of Housing and Urban Development ("HUD"), New York State and New York

City. To be eligible for admission to public housing, families must be "low-income," defined by the United States Housing Act of 1937 as receiving household income less than 80 percent of the median income for the area. *See* 42 U.S.C. §§ 1437a(a)(1) & (b)(2).

The Davis plaintiffs are Latino and African-American individuals residing in or eligible for NYCHA housing (the "Plaintiffs").

Prior Proceedings

The facts and prior proceedings in this litigation are described in the prior opinions of this Court, familiarity with which is assumed. *See Davis v. New York City Hous. Auth.*, Nos. 90 Civ. 628, 92 Civ. 486, 31997 WL 407250 (S.D.N.Y. July 18, 1997) (hereinafter *Davis IV*); *Davis v. New York City Hous. Auth.*, 940 F. Supp. 80 (S.D.N.Y. 1996) (hereinafter *Davis III*); *Davis v. New York City Hous. Auth.*, 839 F. Supp. 215 (S.D.N.Y. 1993) (hereinafter *Davis II*); *Davis v. New York City Hous. Auth.*, No. 90 Civ. 0628, 1992 WL 420923 (S.D.N.Y. Dec. 31, 1992) (hereinafter *Davis I*).

On May 31, 1990, the Plaintiffs filed a class action complaint against NYCHA, styled *Davis v. New York City Housing Authority*, 90 Civ. 628, alleging discrimination on the basis of race, color, and national origin in the selection and assignment of public housing tenants in violation of the Fair Housing Act of 1968, as amended, 42 U.S.C. §§ 3601 (the "Fair Housing Act"); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and 42 U.S.C. §§ 1981, 1982, 1983. The United States later initiated a parallel action, *United States v. New York City Housing Authority*, 92 Civ. 4873, also alleging that NYCHA's policies and practices of selecting tenants for projects violated the Fair Housing Act.

On July 1, 1992, a Consent Decree was signed by the United States, the Plaintiffs and NYCHA. The Consent Decree consolidated the Government's and Plaintiffs' complaints, certified a plaintiff class of African-American and Hispanic applicants and tenants, and provided certain relief to the class, including the implementation of the TSAP, which NYCHA now proposes to modify. Pursuant to Fed. R. Civ. P. 23(e), a fairness hearing was held on November 6, 1992. Additional written statements were received by the Court through November 11, 1992. A summary order approving the Consent Decree was entered on November 17, 1992, followed by a written opinion and order of the Court dated December 30, 1992. *See Davis I.*

By opinion dated December 2, 1993, the Consent Decree was clarified, and NYCHA was enjoined from using "duplicate requests" in filling larger apartments at one of the NYCHA's projects. *See Davis II.* By order dated September 30, 1996, this Court granted Plaintiffs' motion for an extension of time to file objections to the proposed modifications to the TSAP that are the subject of this motion. *See Davis III.*

Plaintiffs filed a motion to preliminarily enjoin NYCHA from implementing two proposed changes to the TSAP on November 15, 1996. Oral argument was heard on April 2, 1997. Submissions were received through April 17, 1997, at which time the matter was deemed fully submitted. The Court, in an opinion dated July 18, 1997, granted the Plaintiffs' motion "to the extent that NYCHA will be enjoined from implementing a 'Working Family Preference' as proposed" but denied Davis' request to enjoin NYCHA from expanding " 'Project Choice' to permit larger families to specify the project in which they wish to live." *Davis IV* at *1.

NYCHA filed the instant motion on August 4, 1997. Plaintiffs filed opposition papers on August 15, 1997,

and NYCHA filed a reply on August 25, 1997. Supplementary materials were received through September 24, 1997.

In accordance with the Court's instructions in *Davis IV*, NYCHA filed a Proposed Order and supporting documentation on October 16, 1997. Plaintiffs filed a Counter-Proposed Order on October 30, 1997 along with a Memorandum of Law in Opposition to Defendant's Proposed Order and in Support of Plaintiffs' Proposed Order and an affidavit from Plaintiffs' expert. On November 5, 1997, NYCHA submitted a letter to oppose Plaintiffs' proposed order, at which time the motion and proposed orders were deemed fully submitted.

Discussion

I. *Standard For Reconsideration*

Local Rule 6.3 provides in pertinent part, "there shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked."[1] *See* SDNY R. 6.3. Thus, to be entitled to reargument, a party must demonstrate that the Court overlooked controlling decisions or factual matters put before it on the underlying motion. *See Domenech v. City of New York*, 927 F. Supp. 106, 108 (S.D.N.Y. 1996); *Violette v. Armonk Assocs., L.P.*, 823 F. Supp. 224, 226 (S.D.N.Y. 1993); *Fulani v. Brady*, 149 F.R.D. 501, 503 (S.D.N.Y. 1993), *aff'd*, 35 F.3d 49 (2d Cir. 1994). Therefore, a party in

[1] Rule 6.3 requires that a motion for reargument be "served within ten (10) days after the docketing of the Court's determination of the original motion." The original motion was decided on July 17, 1997. Not counting intervening weekends or holidays, the ten days expired on July 31. The instant motion was not filed until August 4. Accordingly, the motion is late. Plaintiffs, however, did not raise this issue, and on this basis the motion is not denied as untimely.

its motion for reargument "may not advance new facts, issues or arguments not previously presented to the court." *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, No. 86 Civ. 6447, 1989 WL 162315, at *3 (S.D.N.Y. August 4, 1989), *rev'd on other grounds*, 967 F.2d 742 (2d Cir. 1992).

Local Rule 6.3 is to be narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court. *See Caleb & Co. v. E.I. Du Pont De Nemours & Co.*, 624 F. Supp. 747, 748 (S.D.N.Y. 1985). In deciding a Local Rule 6.3 motion, the Court must not allow a party to use the motion to reargue as a substitute for appealing from a final judgment. *See Morser v. AT&T Info. Sys.*, 715 F. Supp. 516, 517 (S.D.N.Y. 1989); *Korwek v. Hunt*, 649 F. Supp. 1547, 1548 (S.D.N.Y. 1986), *aff'd*, 827 F.2d 874 (2d Cir. 1987).

II. *There Is No Basis To Reconsider Whether The WFP Would Perpetuate Past Discrimination*

According to NYCHA, the Court overlooked factual matters which were material to the Court's decision. Specifically, NYCHA disputes the conclusion that "the plaintiffs have adequately demonstrated a likelihood of success in proving a prima facie case that the Working Family Preference would perpetuate past segregation in predominantly white projects." *Davis IV* at *14. The Court reached this conclusion upon crediting the Plaintiffs' expert testimony that, "assuming [ ] existing turnover and move-in rates persist and that for each vacancy set aside for claimants under the Davis decree, a family of color would replace a white family, implementation of the Working Family Preference would effectively 'freeze' the desegregation process at the racially identifiable projects, in violation of Title VIII."

Id. at *12. The Court accepted the expert's conclusion that the WFP will "more than double white admission rates" and that "many of these additional white families will be concentrated in predominantly white developments." *Id.*

In essence, NYCHA first argues that the analysis was flawed and, according to NYCHA's new analysis, the statistics show that past segregation would not be perpetuated, but rather in some instances would be reversed by the WFP. As Plaintiffs point out, NYCHA had the opportunity to present its own expert analysis to rebut Plaintiffs' argument. The Court addressed NYCHA's rebuttal point by point.[2] It is not appropriate, as NYCHA attempts to do here, to advance new argument regarding the effect of the WFP on perpetuating segregation on a motion to reconsider. *See Scheiner v. Wallace*, 955 F. Supp. 232, 237 (S.D.N.Y. 1997) ("[A] party in its motion for reargument 'may not advance new facts, issues or arguments not previously presented to the court.'" (quoting *Litton*, 1989 WL 162315, at *3)).

Similarly, NYCHA's argument that, even accepting Plaintiffs' analysis, the differential between the number of white families moving into the disproportionately white projects under the present TSAP and the proposed

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[2] The Court rejected the four principal arguments advanced by NYCHA, which were that (1) "the effects of past discrimination have been 'attenuated' by the passage of time," *id.* at *12; (2) "because the cause of the past segregation was racial steering practices, not tenant selection practices, the fact that proposed tenant selection practices would perpetuate or prolong existing segregation is irrelevant," *id.* at *13; (3) "the fact that the proposed WFP will actually align the racial composition of new admissions with that of the applicant pool somehow prevents a finding of perpetuation of past segregation," *id.*; and (4) "only a small number of projects continue to be disproportionately white, while the majority of tenants are minority and the bulk of the projects are racially integrated, vitiates any claim of segregation," *id.* at *14.

plan is essentially *de minimis* is a new argument not properly addressed on a motion for reconsideration. The Court found that the WFP would "more than double white admission rates." *Id.* at *12. Indisputably this is a step backwards, however small, in desegregating the projects at issue. In light of the Court's conclusion that "NYCHA has not sustained its burden of demonstrating that there is no less discriminatory means of advancing the same interests" as those intended to be achieved by the WFP program, even a small step in the wrong direction is impermissible. *Id.* at *14.

III. *The Preliminary Injunction Will Be Modified*[3]

Pursuant to the Court's direction in *Davis IV* to settle an order on notice, NYCHA and the Plaintiffs submitted a Proposed Order and a Counter-Proposed Order (together, the "Proposed Orders"). In the Proposed Orders and the letters submitted therewith, both parties agree that the WFP considered in *Davis IV* will not perpetuate past discrimination at any of the NYCHA projects other than the 21 projects where greater than 30% of the apartments are rented to whites (the "Disproportionate Projects"). Both parties further agree that NYCHA may extend limited project choice to families requiring three or four-bedroom apartments. They disagree, however, on the appropriate modification to the WFP that is necessary to avoid perpetuating past discrimination in the Disproportionate Projects.

NYCHA proposes to modify the WFP to eliminate two categories of preference codes (L3 and F3) for the Dis-

[3] NYCHA moved for reconsideration of the preliminary injunction. NYCHA's argument, that by applying the preliminary injunction to projects that were not disproportionately white the injunction was overbroad, is moot in light of the modification to the preliminary injunction herein.

proportionate Projects. Under the WFP up to half of all vacancies would be reserved for so-called "local Preference" holders (categories L1, L2, and L3). Priority L1 would correspond to families with the highest incomes (Tier III families) and priority L3 would correspond to families with the lowest incomes (Tier I families). According to NYCHA, since the L3 population is disproportionately white, the elimination of L3 designated families from the WFP addresses the Plaintiffs' concern that the WFP would perpetuate past discrimination.

Plaintiffs contend, however, that elimination of the L3 and F3 categories will have no effect on the admissions of white families as compared with the unmodified WFP, since eliminating L3-designated applicants is largely irrelevant to the overall effect of the WFP because the L1 and L2 categories, having higher priorities, would obtain most of the apartments. Furthermore, Plaintiffs contend that the L1 and L2 categories are also disproportionately white as compared with the percent of white families who presently obtain apartments, and accordingly the effect would still be a net increase in the number of white families as compared to the present TSAP, and would not, therefore, cure the discriminatory defect found in *Davis IV*. Although NYCHA attacks Plaintiffs' expert's statistics, it has not provided any rebuttal statistical analysis.

The Plaintiffs counter-propose that all applicants with local preference codes should be barred from apartments in the Disproportionate Projects. In this way, the purportedly over-represented white applicants in these preference code categories would not adversely influence the unmodified TSAP currently in effect. NYCHA notes that virtually all working families will be assigned to one of these local preference codes, and that therefore no working families would move into the Disproportionate Projects.

NYCHA asserts that this result would be bad policy and a violation of Federal law, pointing to the United States Housing Act, 42 U.S.C. § 1437d(c)(4)(A)(iv), which requires NYCHA "to ensure that, to the maximum extent feasible, the projects of an agency will include families with a broad range of incomes and will avoid concentrations of low-income and deprived families with serious social problems." In addition, NYCHA notes that the implementing regulations require NYCHA to "attain, to the maximum extent feasible, a tenant body in each project that is composed of families with a broad range of incomes and to avoid concentrations of the most economically deprived families with serious social problems." 24 C.F.R. § 960.204(a)(2)(i). However, NYCHA has not presented any statistical analysis to establish that the WFP is necessary to attain a tenant body with a broad range of incomes in the Disproportionate Projects.

On the present record, the modification to the WFP proposed by NYCHA appears to adversely affect the ratios at the Disproportionate Projects in terms of the purposes of the Consent Decree. However, since both parties agree that the WFP should go forward for the non-Disproportionate Projects, the preliminary injunction is modified to the extent that:

1. NYCHA may implement the working-family preference as proposed in any project where white families do not constitute more than 30 percent of the families at the project; and

2. NYCHA may extend limited project choice to families requiring three or four-bedroom apartments.

Furthermore, NYCHA is granted leave to move to modify the preliminary injunction consistently with this Opinion and upon any further showing of good cause.

Conclusion

For the reasons set forth above, NYCHA's motion for reconsideration and reargument is denied. The preliminary injunction is modified as set forth above.

It is so ordered.

New York, N. Y.
November 13, 1997

ROBERT W. SWEET

ROBERT W. SWEET
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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90 Civ. 628 (RWS)

PAULINE DAVIS, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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92 Civ. 4873 (RWS)

UNITED STATES OF AMERICA,

Plaintiff,

—against—

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

AMENDMENT

Sweet, D.J.

The opinion of this Court in the above-entitled actions, dated November 13, 1997, is hereby amended as follows:

On page 5, second paragraph, line 4 after the word "overlooked," footnote 1 will be deleted.

It is so ordered.

New York, N. Y.
November 18, 1997

ROBERT W. SWEET
ROBERT W. SWEET
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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90 Civ. 628 (RWS)

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OPINION

Sweet, D.J.

Plaintiffs in *Davis v. New York City Housing Authority* have moved to preliminarily enjoin defendant, the New York City Housing Authority ("NYCHA"), from implementing two proposed changes to the Tenant Selection and Assignment Plan (the "TSAP"), which was incorporated by reference in the Consent Decree in this matter.

For the reasons set forth below, the plaintiffs' motion will be granted to the extent that NYCHA will be enjoined from implementing a "Working Family Preference" as proposed. However, NYCHA will not be enjoined from expanding "Project Choice" to permit larger families to specify the project in which they wish to live.

The Parties

NYCHA is the largest public housing agency in the United States, operating more than 320 projects, comprising approximately 180,000 apartments which house nearly 500,000 people. NYCHA operates these projects pursuant to an Annual Contributions Contract and other agreements with the Department of Housing and Urban Development ("HUD"), New York State and New York City. To be eligible for admission to public housing, families must be "low-income," defined by the United States Housing Act of 1937 as receiving household income less than 80 percent of the median income for the area. *See* 42 U.S.C. §§ 1437a(a)(1), 1437a(b)(2).

The Davis plaintiffs are Latino and African-American individuals residing in or eligible for NYCHA housing.

Prior Proceedings

The facts and prior proceedings in this litigation are described in the prior opinions of this Court, familiarity with which is assumed. *See Davis v. New York City Hous. Auth.*, No. 90 Civ. 0628, 1992 WL 420923 (S.D.N.Y. Dec. 31, 1992) ("*Davis I*"); *Davis v. New York City Hous. Auth.*, 839 F. Supp. 215 (S.D.N.Y. 1993) ("*Davis II*"); *Davis v. New York City Hous. Auth.*, 940 F. Supp. 80 (S.D.N.Y. 1996) ("*Davis III*").

On May 31, 1990, the Davis plaintiffs filed a class action complaint against NYCHA, styled *Davis v. New York City Housing Authority*, 90 Civ. 628, alleging discrimination on the basis of race, color, and national origin in the selection and assignment of public housing tenants in violation of the Fair Housing Act of 1968, as amended, 42 U.S.C. §§ 3601 *et seq.* (the "Fair Housing Act"); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and 42 U.S.C. §§ 1981, 1982, 1983. The United States later initiated a parallel action, *United States v. New York City Housing Authority*, 92 Civ. 4873, also alleging that NYCHA's policies and practices of selecting tenants for projects violated the Fair Housing Act.

On July 1, 1992, a Consent Decree was signed by the United States, the *Davis* plaintiffs and NYCHA. The Consent Decree consolidated the government and *Davis* complaints, certified a plaintiff class of African-American and Hispanic applicants and tenants in *Davis*, and provided certain relief to the class, including the implementation of the TSAP, which NYCHA now proposes to modify.

Pursuant to Fed. R. Civ. P. 23(e), a fairness hearing was held on November 6, 1992. Additional written statements were received by the Court through November 11, 1992. A summary order approving the Consent Decree

was entered on November 17, 1992, followed by a written opinion and order of the Court dated December 30, 1992. *Davis I*, 1992 WL 420923.

By opinion dated December 2, 1993, the Consent Decree was clarified, and NYCHA was enjoined from using "duplicate requests" in filling larger apartments at one of the NYCHA's projects. *Davis II*, 839 F. Supp. 215.

By order dated September 30, 1996, this Court granted plaintiffs' motion for an extension of time to file objections to the proposed modifications to the TSAP that are the subject of this motion. *Davis III*, 940 F. Supp. 80.

Plaintiffs filed the instant motion on November 15, 1996. Oral argument was heard on April 2, 1997. Submissions were received through April 17, 1997, at which time the matter was deemed fully submitted.

The Consent Decree

The Consent Decree provides for the following: (1) injunctive relief barring future housing discrimination on the basis of race, color or national origin, Consent Decree ¶ 4; (2) the implementation of a new TSAP which substantially revises NYCHA's tenant selection and assignment systems, and which prohibits further discrimination, Consent Decree ¶¶ 5-9, Ex. B; (3) remedial relief for 2,190 claimants[1] of NYCHA's past discrimination, Consent Decree ¶¶ 10-39; and (4) significant record keeping and reporting by NYCHA regarding tenant selection and assignment practices, Consent Decree ¶¶ 43-48.

The Consent Decree also requires NYCHA to "adopt and implement the TSAP . . . to prevent any unlawful

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[1] The remedial relief consisted of awarding HUD Section 8 housing vouchers to 200 claimants; the remaining 1,990 claimants received priority placement in one of 31 public housing projects.

discrimination on the basis of race, color, or national origin, in compliance with the Housing Authority's obligations therewith under Title VI, the Fair Housing Act and the implementing regulations and requirements of HUD." Consent Decree ¶ 5. In adopting and implementing the TSAP with "respect to existing projects and new projects to be opened in the future," NYCHA agreed that it would use "no racial quota system, or other practice, technique or device to house Applicants in particular projects, buildings, or apartments, or to otherwise limit the availability of housing, on account of race, color, or national origin." Consent Decree ¶ 7(a).

The Consent Decree contains the following provision for raising objections to proposed modifications to the TSAP:

> If, during [the five year effective period of the Consent Decree], the Housing Authority finds it necessary to modify any provision of the TSAP, the Housing Authority will provide written notice to the parties . . . . If any party objects to the proposed modification on the ground that it may result in discrimination on the basis of race, color, or natural origin, it may petition the Court to resolve the objection . . . . Pending resolution by the Court, the Housing Authority may implement the proposed modification at its own risk, but without prejudice to the right of the plaintiffs to move the court to enjoin the proposed modification as inconsistent with the terms of this Consent Decree, and to seek full and complete relief for persons harmed by the changes, and any other appropriate relief authorized by the Fair Housing Act. Nothing in this paragraph shall be construed to relieve the Housing Authority of its obligation to obtain HUD approval of any

modification to the TSAP pursuant to 24 C.F.R. § 1.4(b)(2)(ii).

Consent Decree at 13-14, ¶ 6(b).

Findings of Fact

In approving the Consent Decree, the Honorable Pierre N. Leval, then a district judge, found that the "Plaintiffs' evidence supports their allegations that during specified periods of time the Housing Authority selected and assigned applicants for public housing, and tenants requesting transfers, to certain housing projects using methods that resulted in unlawful discrimination against Blacks and Hispanics. These methods included (1) the intermittent use of codes denoting housing projects to which only white families could be assigned; (2) the use of zip code and other geographic restrictions on admission to projects; (3) the use of racial goals or targets [in new projects]; and (4) the assignment of families to projects where vacancies were not expected to arise." *Davis I*, 1992 WL 420923, at *2.

In support of the fairness of the Consent Decree, NYCHA submitted a memorandum conceding that it used race-conscious tenant assignment practices that led to the "steering" of white applicants to predominantly white projects.

The TSAP is a central feature of the relief provided by the Consent Decree. The current TSAP establishes a three-stage process for selecting applicants for vacancies in NYCHA housing. In the first stage, applicants are chosen for eligibility interviews from the overall applicant pool. Based on information applicants provide in written application forms, NYCHA assigns priority codes to each application. Certain priority codes correspond to preferences required by federal statutes and regulations. These "Federal Preferences" include pref-

erences for applicants who are involuntarily displaced from their dwellings, live in substandard housing, or pay more than 50% of their income in rent. Other priority codes correspond to NYCHA's "Local Preferences." Applicants who receive a sufficiently high priority code are called in for eligibility interviews. In 1995, approximately 15% of all applicants were granted interviews.

The second stage of the selection process under the current TSAP involves the assignment of individuals to waiting lists for vacancies. At the eligibility interview, applicants deemed eligible for housing are asked to select either a project or a borough in which they wish to live. Applicants needing larger apartments (more than two bedrooms) and applicants in emergency categories are asked to select only the borough in which they wish to live. Their names are added to a waiting list for that borough, and when vacancies arise in that borough, the vacancies are filled with applicants chosen from the list. In contrast, applicants needing a smaller apartment (0-2 bedrooms) are asked to select a particular project where vacancies were expected within six to nine months and are placed on the waiting list for that specific project. The option to select a particular project is referred to as "Project Choice."

In the final phase of the selection process, applicants on project or borough waiting lists are chosen to fill vacancies as they arise. A key factor in selecting applicants from the waiting list is the applicant's "Income Tier." NYCHA divides applicants into three tiers. Tier I families have the lowest income, while Tier III families have the highest incomes. Under the current TSAP, in selecting applicants from the waiting lists, NYCHA attempts to rent 25% of all vacancies to Tier III families, 37.5% to Tier II families and 37.5% to Tier I families. To do so, NYCHA adheres to the following selection

protocol: the first vacancy is offered to the Tier III applicant with the highest priority and the oldest date of certification; the second vacancy is offered to the Tier II applicant with the highest priority and the oldest date of certification; the third vacancy is offered to the Tier I applicant with the highest priority and oldest date of certification; and the sequence is repeated until 25% of the expected annual vacancies are filled with Tier III families, after which all subsequent vacancies are offered only to Tier I and II applicants.

Historically, public housing applicants in the lowest income categories accounted for approximately 1/3 of all NYCHA rentals. Since 1990, however, an increase in homeless families applying for housing has resulted in a significant increase in the number of rentals to the lowest income applicants. By 1995, these lowest income applicants accounted for 77.6% of new admissions. NYCHA states, and plaintiffs do not dispute, that unless a higher proportion of applicants with higher incomes receive rentals, the stability of the projects will be jeopardized. Moreover, ten years ago, nearly one half of families in NYCHA projects were working families. Today, fewer than one third are employed.

NYCHA proposes two changes to the TSAP. First, NYCHA proposes to adopt a "Working Family Preference." NYCHA would establish new local priorities as part of the applicant selection process. The highest local priority would be assigned to the highest income, Tier III applicants. The second priority is given to Tier II families. The lowest priority is given to Tier I families, but only to those who are working or are disabled. Tier I families receiving public assistance would receive no local priority. In addition, the proposed TSAP would categorize federal preference holders as working (including the disabled) or "nonworking." The federal preference

holders who are working or disabled would receive a priority over those who are not. NYCHA also proposes to increase to 50% the proportion of new rentals to local preference holders and reduce the proportion of rentals to federal preference holders to 50%.

Second, NYCHA proposes expanding "Project Choice" to permit families needing larger apartments of up to four bedrooms to select not only the borough in which they wish to live, but the project as well. Non-emergency applicants seeking 0-4 bedroom apartments would now be permitted to choose the project in which they wish to live.

The following facts are essentially undisputed. White families constitute 10% of NYCHA's adjusted applicant pool. Under the existing TSAP, white applicants received 4.2% of the rentals in 1995. Had the Working Family Preference been in place in 1995, 9.9% of the families admitted to public housing would have been white. African-American families constitute 35.6% of the applicant pool, received 45.9% of the rentals under the current TSAP in 1995, and would have received 44.1% of the rentals had the proposed TSAP been in place. Puerto Rican families constitute 22.3% of the applicant pool, received 30% of the rentals in 1995, and would have received 22.7% of rentals under the proposed TSAP. Hispanics (other than those of Puerto Rican descent) constitute 18.4% of the pool, received 14.6% of the rentals in 1995, and would have received 14.2% of the rentals under the proposed TSAP. Applicants who identified themselves as "other" constitute 13.7% of the applicant pool, received 5.2% of the rentals in 1995, and would have received 9.1% of the rentals under the proposed TSAP. With the exception of the non-Puerto Rican Hispanics, the differences between the percentage of each racial group receiving apartments under the old

TSAP and the percentage of that racial group receiving apartments under the new TSAP are all statistically significant.

In addition, the plaintiffs' expert compared the projected white admission rate of 9.9% under the proposed TSAP to the white admission rates for each year from 1990 through the present, and found that the 9.9% rate was significantly higher than the rate in any other year examined.

Implementation of the proposed TSAP would also result in a statistically significant change in the racial composition of the top 15% of applicants, who are those likely to be called for interviews. Under the current TSAP, only 7.2% of the top 15% of applicants are white. If the new Working Family Preference were implemented, there would be a statistically significant increase in the percentage of white families in the top 15% of the list of applicants. These conclusions are not disputed by NYCHA.

Finally, plaintiffs' expert has concluded that of the eleven projects that remained more than 50% white as of June 1996, the process of desegregation occurring under the current TSAP would be reversed at four of the projects, desegregation would stop at four projects, and desegregation would slow significantly at three of the projects if the proposed Working Family Preference were implemented.

Plaintiffs contend that the expansion of Project Choice to larger apartments would perpetuate past discrimination. Plaintiffs' expert has calculated that, in 1995, Project Choice for smaller apartments has resulted in 54 more white families moving into projects that are greater than 25% white than would have moved into such projects had Project Choice been unavailable. If Project Choice had been expanded, an additional five white fam-

ilies would have moved into such projects, for a total of 59 white families in projects that are 25% or more white who would not have moved into such projects in the absence of Project Choice. In addition, 38 white families who would not otherwise have been admitted to projects that are between 10% and 25% white were admitted to such projects because of Project Choice for smaller apartments. Three additional white families would have moved into these projects had Project Choice been available for those needing larger apartments. Thus 8 additional white families would move into "white" projects if Project Choice were expanded as proposed. In projects that are greater than 10% white, however, there has been a net decline of more than 800 white families per year since 1990, when Project Choice was available only for small apartments, and in projects that are greater than 30% white, there has been an annual decline of 880 white families.

NYCHA submitted these proposed TSAP changes to HUD for approval. NYCHA also submits routine data reports to HUD, from which the racial effects of tenant selection and assignment practices can be evaluated. By letter dated July 31, 1996, HUD stated that, with regard to the proposed Working Family Preference, "HUD does not approve local preferences, and thus NYCHA may create these local preferences, so long as notice and comment requirements are met. However, NYCHA should be mindful of the injunctive relief provided for by the *Davis* consent decree and its responsibilities under civil rights statutes." By letter dated October 24, 1996, HUD approved the implementation of Project Choice for three and four bedroom apartments, concluding that "the extension of Project Choice . . . is not likely to affect the racial identifiability of developments in New York City for the remaining period of the *Davis*

TSAP." HUD required NYCHA to collect and report data on the effect of the expansion of Project Choice.

Discussion

I. *The Legal Standards*

A. *Preliminary Injunction*

In general, a party seeking a preliminary injunction under Fed. R. Civ. P. 65 must demonstrate: (1) irreparable injury and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tipping decidedly in favor of the movant. *Blum v. Schlegel*, 18 F.3d 1005, 1010 (2d Cir. 1994); *Sweeney v. Bane*, 996 F.2d 1384, 1388 (2d Cir. 1993); *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 135-36 (2d Cir. 1992).

"Where a moving party challenges government action taken in the public interest pursuant to a statutory or regulatory scheme, however, the moving party cannot rely on the 'fair ground for litigation' standard, but is required to demonstrate irreparable harm and a likelihood of success on the merits." *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996) (citations and internal quotations omitted); *NAACP v. Town of East Haven*, 70 F.3d 219, 223 (2d Cir. 1995); *Bane*, 996 F.2d at 1388. Plaintiffs concede that they must demonstrate a likelihood of success on the merits and irreparable harm to obtain the injunctive relief they seek.

B. *The Fair Housing Act*

Paragraph 5 of the Consent Decree incorporates the standards of the Fair Housing Act for the evaluation of the implementation of the TSAP. Accordingly, to show

a likelihood of success on the merits, plaintiffs must be likely to succeed in proving that the challenged provisions of the proposed TSAP would violate the Fair Housing Act.

To establish a violation of the Fair Housing Act, a plaintiff must prove that "the challenged practice of the defendant 'actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect.'" *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir.), *aff'd*, 488 U.S. 15 (1988). Discriminatory effect "arises in two contexts: adverse impact on a particular minority group and harm to the community generally by the perpetuation of segregation." *Id.* at 937.

Once a plaintiff has made a *prima facie* showing that the challenged action has an adverse impact on a minority group or perpetuates segregation resulting from past discrimination, the burden shifts to the defendant to prove "that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Id.* at 936, (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978)).

II. *The Working Family Preference*

A. *Adverse Impact*

1. *The Appropriate Comparison Group*

Plaintiffs contend that the proposed Working Family Preference would have a disparate adverse impact on minorities.

The parties do not differ significantly over the accuracy of the statistics presented by the experts. They do

disagree over the legal significance of those statistics. Although disproportionate adverse impact is generally demonstrated through the use of statistics, to be meaningful the statistical analyses must employ appropriate comparison groups in assessing the challenged practice. *See Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development*, 56 F.3d 1243, 1253 (10th Cir. 1995) ("Although discriminatory effect is generally shown by statistical evidence, any statistical analysis must involve the appropriate comparables.").

Conventionally, the adverse impact of an applicant selection practice in housing and employment cases is determined by whether minority applicants are chosen at a rate lower than their proportional representation in the overall applicant pool. *See, e.g., United States v. Starrett City Assocs.*, 840 F.2d 1096, 1099 (2d Cir.) (comparing racial composition of apartment occupancy to racial composition of applicants in "active file"), *cert. denied* 488 U.S. 946 (1988); *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148, 154-55 (S.D.N.Y. 1989) (comparing percentage of minorities excluded by challenged policy to percentage of minorities in "applicant pool" of households eligible for residence); *cf. Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989) (comparison between racial composition of qualified persons in relevant labor market and persons holding at-issue jobs generally forms proper basis for initial inquiry in disparate impact case under Title VII), *superseded by statute on other grounds*, Civil Rights Act of 1991, § 105, 42 U.S.C. § 2000e-2(k) (1994); *Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977).

"There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual appli-

cants." *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (in Title VII case, permitting showing of disparate impact using general population statistics where application process might discourage potential female applicants from applying). The ultimate question is whether a challenged action has a disproportionate impact on the minorities in the relevant eligible population.

Here, the proposed TSAP, with the Working Family Preference, does not result in an under-representation of minorities selected for apartments relative to their representation in the overall applicant pool. Indeed, as plaintiffs concede, white applicants, who make up 10% of the applicant pool, would receive only 9.9% of apartments under the new TSAP.[2]

Plaintiffs, however, contend that only those applicants who have sufficiently high priority rankings under the TSAP are truly "eligible" for NYCHA housing. Thus, they contend, the appropriate pool of qualified applicants is actually the highest ranked 15% of the applicant pool.

In *Waisome v. Port Authority*, 948 F.2d 1370 (2d Cir. 1991), job applicants were required to take a written test. Applicants receiving a 66 on the written test were "eligible" for the positions in question. Minorities achieved this threshold score in numbers proportional to their representation in the applicant pool. However, as a practi-

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[2] Plaintiffs contend that *Connecticut v. Teal*, 457 U.S. 440 (1982), forbids the use of the overall applicant pool as a point of comparison. *Teal* does not stand for the proposition that the racial composition of the applicant pool is an inappropriate point of comparison. It stands, rather, for the proposition that an employer (or a housing authority) may not defend a screening practice that disproportionately affects minority applicants by contending that some practice later in the selection process results in a "bottom line" minority hiring rate that matches or exceeds the percentage of minorities in the overall applicant pool.

cal matter, only those scoring above 76 on the test would be eligible for promotion. Minority applicants achieved this score at a rate lower than their rate of representation in the applicant pool. The Second Circuit held that, where the score on a written test served as both a threshold bar to promotion and as a component in the ultimate promotion decision for those who passed the threshold, a racial disparity in the distribution of scores above the threshold could make out a *prima facie* case of disparate impact, even if there was no disproportionate racial impact at the threshold score itself. *Id.* at 1378.

Plaintiffs observe that white applicants make up only 7.2% of the top 15% of the applicant pool under the existing TSAP and that they would constitute a significantly higher percentage of the top 15% under the proposed TSAP. Plaintiffs have provided no direct evidence about the racial composition of the top 15% of the applicant pool under the new TSAP. In the absence of contrary evidence, it will be assumed that the percentage of whites—the top of the pool—would reflect their percentage in the overall pool. Thus, whites would make up 10% of the top 15% of the pool under the new TSAP. Under both the current and the proposed TSAP, then, whites are not over-represented at the threshold priority ranking at which they have a practical chance of receiving an apartment. Thus, as in *Waisome*, the Working Family Preference has no apparent selection bias against minority applicants at the level of the "cut-off score." However, under *Waisome*, if plaintiffs could demonstrate that whites had higher priority rankings than minorities within the top 15% under the proposed TSAP, they would still make out a *prima facie* case.

Plaintiffs, however, have not presented any evidence that whites have higher priority scores than minorities within the top 15% under the proposed TSAP. Instead,

they contend that the composition of the top 15% would be significantly more "white" under the proposed TSAP than it is under the *current* TSAP. *Waisome* did not compare differences in racial composition under different selection procedures, but the effect of a single selection procedure on individuals who achieved a cutoff score.

Plaintiffs, however, insist that the proper comparison is between the racial composition of the top of the applicant pool under the current TSAP and the composition of the top of the pool under the proposed TSAP. They also present evidence indicating that the 9.9% white admission rate under the proposed TSAP would be significantly higher than the white admission rate for each of the years 1990 through 1995, and urge that these historical discrepancies demonstrate a disparate adverse impact.

In some employment discrimination cases, a change in the racial or gender composition of a workforce over time may be relevant to the disparate impact inquiry. *See* Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 1700-1701 & n.70 (3d Ed. 1996). For example, in *Valentino v. U.S. Postal Service*, 511 F. Supp. 917 (D.D.C. 1981), *aff'd*, 674 F.2d 56 (D.C. Cir. 1982), the court concluded that evidence that the number of women in higher paid positions increased while the number of male employees in these positions decreased rebutted plaintiff's claim that women were disadvantaged in promotions. *Id.* at 954.

While temporal analyses may be useful in some circumstances, current applicant flow data is generally preferred for establishing the adverse impact of a challenged selection practice. *See Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983) ("Disparate impact should always be measured against the actual pool of applicants or eligible employees

unless there is a characteristic of the challenged selection device that makes use of the actual pool of applicants or eligible employees inappropriate."). The use of historical comparisons, such as that proposed by plaintiffs, can be suspect, because time-dependent factors other than the challenged practice, such as demographic changes in the composition of the underlying pool, could account for observed changes in racial composition. For example, one court recognized that the use of 1980 census data in 1989 could bias results because of the possibility of significant racial changes in the population of the community. *Bronson*, 724 F. Supp. at 155.

When more accurate data on the racial impact of a challenged selection method are unavailable, the use of alternative statistics, such as historical trends or time-series analysis correlating drops in minority representation with the implementation of a challenged employment practice, may be useful. Moreover, historical trends may illuminate the significance of other data. *See Hazelwood School District v. United States*, 433 U.S. 299, 309 (1977) (courts should consider selection during relevant time period, rather than "snap-shot" of current racial composition of workforce, because current composition may be result of discriminatory practices that took place before effective date of Title VII, rather than current discriminatory practice). Here, however, data on the impact of the Working Family Preference on current applicants are available, and the historical data provides no additional information on the racial effect of the proposed TSAP on current applicants.

Plaintiffs next contend that the implementation of the new TSAP should be conceptualized as a "reordering" of the existing top 15% of the list. Such a reordering, they argue, disproportionately affects the minorities who have a realistic chance of obtaining an apartment, because

some of them will be eliminated from the list, while the representation of white applicants will be increased.

In *Giles v. Ireland*, 742 F.2d 1366 (11th Cir. 1984), the employer's past discriminatory hiring practices resulted in a disproportionate number of African-Americans being hired into the employer's lowest level Mental Health Worker I ("MHW-I") positions. The higher MHW-II and MHW-III positions were predominantly filled by whites. *Id.* at 1379. The employer imposed a freeze on promotions from MHW-I to MHW-II level, but did not freeze promotions from MHW-II to MHW-III. *Id.* The "no-promotion" policy thus appeared to fall more heavily on African-Americans than whites. *Id.* at 1376. Because of the freeze on promotions, the district court was unable to determine who had been denied a promotion from MHW-I and how many individuals would have been promoted in the absence of the freeze. *Id.* at 1377. The Eleventh Circuit concluded that, in the absence of more precise evidence of who would have been promoted, the top half of the register of applicants for promotions represented those individuals most likely to have lost promotions as a result of the policy. *Id.* at 1377-78.[3] Because applicants in the top half of the register were predominantly African-American for one of the years during which the freeze was effective, the no-promotion policy deprived a greater number of African-Americans than whites of the opportunity for advancement. *Id.* at 1378. The Eleventh Circuit held that the record was inadequate to determine the discriminatory impact of the no-promotion policy, but stated that Giles' evidence could establish a *prima facie* case, and

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[3] In contrast to the Davis plaintiffs, who contend that only the top of the applicant list should be considered, Giles argued that the court should have considered the total number of MHW-I's or the entire register of applicants, which had a higher percentage of African-American employees than the top of the register. *Id.* at 1376.

remanded to the district court for further proceedings on the issue. *Id.* at 1378-80.

Plaintiffs contend that the implementation of the Working Family Preference here adversely affects minorities, who make up a disproportionately large share of those in the top 15% of the applicant pool, just as the implementation of the promotion freeze in *Giles* adversely affected minorities, who made up a disproportionately large share of those in the top half of the applicant register for promotions to the MHW-II positions.

Giles' holding on disparate adverse impact is inapposite. In *Giles*, the employer permitted continued advancement for employees in positions that were held predominantly by whites, but froze promotion for those in positions that were occupied predominantly by African-Americans. Because the challenged policy was not applied uniformly to all job categories and employees were racially segregated by job category, the policy had a manifest asymmetrical impact. Here, in contrast, NYCHA has proposed the implementation of a new tenant selection preference that applies to all applicants, and there is no asymmetry similar to that in *Giles*. *See United States v. City and County of San Francisco*, 656 F. Supp. 276, 284 (N.D. Cal. 1987) (*Giles* not analogous where promotion freeze did not have impact only on disproportionately minority job classifications).

Moreover, the *Giles* court did not compare historical promotion rates to promotion rates under the challenged practice, as plaintiffs here propose. Instead, the *Giles* court used, in the absence of better data, the composition of a portion of the applicant pool as a proxy for those who would have been promoted, and thus been adversely affected by the challenged promotion freeze.

Finally, plaintiffs' proposed interpretation of *Giles* would create perverse incentives that could actually retard

rapid integration efforts. If a reduction in minority representation from previous practices alone made out a *prima facie* case of disparate impact under Title VIII, a housing authority or landlord would effectively be bound to maintain the past selection criteria that produced the highest level of minority representation. Such a rule would create a "ratchet" effect: a housing authority could institute selection criteria that increase minority representation, but could never make changes that would reduce minority representation below the previously established benchmark. If Title VIII actually imposed such a "historical quota," a housing authority might be reluctant to use criteria that would have the effect of favoring minorities, for fear it would be forever locked into those criteria. Such disincentives to temporary aggressive integration efforts should not be imposed on all housing authorities, regardless of past discriminatory practices.

Accordingly, the proposed Working Family Preference does not have an "adverse impact" on minority applicants.

B. *Perpetuation of Past Discrimination*

1. *Existence of Past Discrimination*

Where a plaintiff fails to demonstrate that a challenged practice imposes a disproportionate burden on minority applicants, she may still make out a *prima facie* case under a disparate impact theory if she can demonstrate that the challenged practice has the effect of perpetuating past segregation. *See Huntington*, 844 F.2d at 937 (*citing Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978)). In order to prove that the Working Family Preference perpetuates

past segregation, plaintiffs must first demonstrate the existence of past segregation.

The record establishes the existence of past segregation in NYCHA housing. Judge Leval's findings demonstrate the persistence of discriminatory practices and resulting segregation in New York City public housing as late as 1991. *See Davis I,* 1992 WL 420923, at *2. Where, as here, a defendant enters into a settlement without rebutting the plaintiffs' *prima facie* case, the settlement amounts to an admission of unlawful discrimination for purposes of evaluating the validity of the remedies imposed. *See Kirkland v. New York State Dep't of Correctional Serv.,* 711 F.2d 1117, 1131-32 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). Indeed, in order to approve race conscious remedies, such as those approved in this case, a court must find that a *prima facie* case of discrimination has been established. *Id.* at 1132, 1134.

NYCHA points to the Consent Decree's disclaimers of liability, which state that "this Consent Decree shall not constitute an adjudication or admission by the Housing Authority of any violations of any law, executive order or regulation." In *Kirkland*, however, the Second Circuit held that such disclaimers are to be construed not as a rebuttal of a *prima facie* case, but as a reservation of rights to explain admitted statistical disparities in future litigation. *Id.* at 1131 n.16. NYCHA has not provided any rebuttal of the allegations of discrimination relied upon by Judge Leval in approving the Consent Decree.

The Consent Decree's disclaimer of liability does not bar consideration of the underlying evidence for the purpose of establishing the existence of past discrimination. In *City of San Francisco*, 656 F. Supp. at 285, the plaintiffs alleged that the cancellation of certain employment examinations perpetuated past segregation by the City of

San Francisco. In a prior action, the City of San Francisco had entered into a consent decree prohibiting discrimination, but disclaiming any admission of liability. The court concluded that, notwithstanding the disclaimer, it could consider the evidence of discrimination underlying the consent decree in determining whether the practice challenged in the case before it perpetuated the past discrimination the prior decree was intended to remedy. *Id.* at 285 & n.9.

Here, the record discloses considerable evidence of past discrimination. In its memorandum in support of the fairness and adequacy of the Consent Decree, NYCHA admitted to race-conscious admissions practices that led to "racial steering" of white applicants to predominantly white housing projects. Move-in, move-out data also demonstrated a consistent pattern of white families being replaced by other white families over time, a pattern the United States, in its memorandum in support of the Decree, concluded "could only occur as a result of a deliberate racial quota system."

Accordingly, the existence of past segregative practices has been adequately established.

2. *Perpetuation of Discrimination*

Segregation in public housing exists if housing projects are "significantly out of racial balance." *Jaimes v. Toledo Metro. Housing Auth.*, 715 F. Supp. 835, 838 (N.D. Ohio 1989); *cf. Brown v. Board of Education of Topeka*, 892 F.2d 851, 869-70 (10th Cir. 1989) (school segregation endures if schools remain "racially identifiable," *i.e.*, predominantly of one race), *remanded for further consideration*, 503 U.S. 978 (1992), *reinstated* 978 F.2d 585 (11th Cir.), *cert. denied*, 509 U.S. 903 (1993). Under the TSAP, a project is considered disproportionately white if more than 30% of its families

are white. TSAP at 29. In *Jaimes*, the court stated that a family housing unit was out of balance if minority representation was over 85% or under 55%, and white representation was over 45% or under 15%. 715 F. Supp. at 838.

Plaintiffs have identified eleven NYCHA projects that remain over 50% white, and are thus "disproportionately white" and "out of racial balance" as a result of NYCHA's past segregative practices. NYCHA does not dispute that these projects are out of racial balance or that under the current TSAP these eleven projects are desegregating.

The implementation of a policy that "freeze[s] the effects of past discrimination" may violate Title VII, and, by analogy,[4] Title VIII. *See Giles*, 742 F.2d at 1380-81 (where past discrimination concentrated blacks at bottom of employment hierarchy, no-promotion policy that freezes effects of past discrimination may violate Title VII). Here, the past segregative practices had the effect of creating racially imbalanced housing projects, eleven of which remain. According to plaintiffs' expert, assuming that existing turnover and move-in rates persist and that for each vacancy set aside for claimants under the *Davis* decree, a family of color would replace a white family, implementation of the Working Family Preference would effectively "freeze" the desegregation process at the racially identifiable projects, in violation of Title VIII. Specifically, the Working Family Preference would reverse the desegregation process at four of the eleven majority-white projects, there would be no further desegregation at another four, and desegregation would be slowed significantly at three other projects. The Working Family Preference will have this effect because it will more than double white admission rates

[4] *See Huntington*, 844 F.2d at 934 (noting relevance of Title VII case law to Title VIII cases).

and because existing trends demonstrate that many of these additional white families will be concentrated in predominantly white developments.

NYCHA advances four principal arguments in response to plaintiff's evidence of perpetuation of past discrimination. First, NYCHA contends that the effects of past discrimination have been "attenuated" by the passage of time. NYCHA cites *Almonte v. Pierce*, 666 F. Supp. 517, 529 (S.D.N.Y. 1987), to support the contention that such attenuation renders the past segregation of little relevance to the legality of the proposed TSAP. However, *Almonte* involved not allegations of perpetuation of past discrimination in violation of Title VIII, but a charge that HUD and the Housing Authority failed to conduct special outreach to the Hispanic community in accordance with factors listed in a HUD-Handbook. The Handbook directed that "the possible existence of practices or policies of discrimination" should be considered in formulating an outreach plan. The plaintiffs pointed to the discriminatory practices identified in ten-year old litigation as a basis for requiring special outreach to the Hispanic community. The court in *Almonte* construed the "existence of discriminatory practices" factor to refer only to *present* discriminatory practices, and thus concluded that the discriminatory practices that had been uncovered and terminated by the litigation of ten years earlier was not relevant to the issue of whether additional outreach should be presently required under the HUD Handbook. *Id.* at 529-30. *Almonte* does not cast doubt on the well-established principle that actions may violate Title VIII if they perpetuate segregation that has not been fully eradicated.

Second, NYCHA contends that because the cause of the past segregation was racial steering practices, not tenant selection practices, the fact that proposed tenant

selection practices would perpetuate or prolong existing segregation is irrelevant. NYCHA cites no authority in support of this contention. Indeed, the *Arlington Heights* litigation demonstrates that a difference between the past practice that caused the current segregation and the nature of the practice that would cause the perpetuation of that segregation does not insulate a defendant from Title VIII liability. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 517 F.2d 409, 413-14 & n.1 (7th Cir. 1975), *rev'd on other grounds*, 429 U.S. 252 (1977), the Seventh Circuit concluded that the Village was racially segregated. The plaintiffs challenged the Village's refusal to rezone a parcel of land to permit the construction of low income housing, which would have substantially increased the minority population in the largely white community. The existing segregation was not attributed by the Seventh Circuit to the zoning practices of the Village, *id.* at 414 (Village asserted, and court did not deny, that Village did not cause existing segregation), and acknowledged that high housing costs were at least partially responsible. *Id.* at 414 n.2. Later in the litigation, the Seventh Circuit concluded that the failure to rezone the parcel could violate Title VIII by perpetuating past segregation, if no other land in the Village would permit construction of the proposed development. *Arlington Heights*, 558 F.2d at 1294. Title VIII liability thus was possible, even though there was no conclusion that the Village's prior zoning practices had caused the housing segregation that its current zoning practices would perpetuate. Similarly, the fact that one set of practices (racial steering) may have caused the initial segregation of NYCHA housing does not prevent a finding that a different set of practices (the Working Family Preference) would impermissibly perpetuate that discrimination.

Moreover, adoption of NYCHA's position would allow perpetrators of housing discrimination to perpetuate the segregation caused by their unlawful practices by the expedient of adopting an unrelated, facially-neutral mechanism to maintain the racial status quo. In the absence of authority for such a result, NYCHA's contention must be rejected.

Third, NYCHA seems to suggest that the fact that the proposed Working Family Preference will actually align the racial composition of new admissions with that of the applicant pool somehow prevents a finding of perpetuation of past segregation. However, this contention impermissibly collapses the distinction between the adverse impact and perpetuation of segregation theories of disparate impact. Moreover, the courts have held in the school desegregation setting that the mere implementation of race-neutral practices may be inadequate to remedy past segregation, if that segregation will persist despite the adoption of race neutral measures. *See*, e.g., *Brown*, 892 F.2d at 868 ("Mere adherence to a race-neutral but ineffective neighborhood school plan is insufficient. In general, any course of action that fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is unacceptable.") (citing *Wright v. Council of City of Emporia*, 407 U.S. 451, 460 (1972)).

Finally, NYCHA contends that the fact that only a small number of projects continue to be disproportionately white, while the majority of tenants are minority and the bulk of the projects are racially integrated, vitiates any claim of segregation. NYCHA again cites no authority for the proposition that perpetuating the existence of racially-identified projects may be justified by the overall level of minorities in the NYCHA system or by the integration of other projects. Indeed, segregation

exists where, as here, a racial group is concentrated in a small number of projects because of past discrimination, *Jaimes*, 758 F.2d at 1108, even when minorities constitute a large proportion of tenants in public housing generally. *Id.* at 1090 (minorities constituted 70% of tenants in family projects).

In sum, plaintiffs have adequately demonstrated a likelihood of success in proving a *prima facie* case that the Working Family Preference would perpetuate past segregation in predominantly white projects.

C. *NYCHA's Justifications*

Once a plaintiff has established a prima facie case of disparate impact in a Title VIII case, the burden shifts to the defendant to prove both: (1) that its actions furthered, in theory and practice, a legitimate, bona fide governmental interest; and (2) that no alternative would serve that interest with less discriminatory effect. *Huntington*, 844 F.2d at 936 (adopting formulation set forth in *Rizzo*, 564 F.2d at 148-49); *United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 445 (E.D.N.Y. 1995); *Oxford House, Inc., v. Town of Babylon*, 819 F. Supp. 1179, 1183 (E.D.N.Y. 1993).

NYCHA asserts two legitimate interests that its proposed Working Family Preference would serve: (1) income integration in public housing; and (2) increasing the number of working families in public housing. Income integration is important to the survival of public housing because it promotes both financial and social stability. Congress has expressly required local housing authorities "to ensure that, to the maximum extent feasible, the projects of an agency will include families with a broad range of incomes and will avoid concentrations of low-income and deprived families with serious social problems." 42 U.S.C. § 1437d(c)(4)(A)(iv).

Recent federal regulations expressly permit local preferences favoring working families. *See* 24 C.F.R. § 960.205(a) (1995). In adopting these regulations, HUD stated that it was "convinced that housing agencies must have the flexibility to give preference to working families to assure diversity in the residency of projects and to include families who can serve as role models for other families." 59 Fed. Reg. 36,618-19 (July 18, 1994).

Plaintiffs concede that these objectives are legitimate, and that the Working Family Preference would help NYCHA achieve these goals. However, plaintiffs contend that NYCHA has not sustained its burden of demonstrating that there is no less discriminatory means of advancing the same interests.

Plaintiffs propose an alternative method of increasing the representation of upper income families that would have a less racially discriminatory effect than the Working Family Preference as proposed by NYCHA. Rather than assigning a separate local preference to Tier I working families, plaintiffs propose that all Tier I families, working and non-working, be assigned the lowest local preference. Under this plan, Tier I families would continue to rank below Tier II and Tier III families, and thus the number of rentals to upper income families would still increase. Because there are almost twice as many white applicants among Tier I working families as among Tier I non-working families, however, the elimination of the distinction between working and non-working families in the lowest income Tier would result in a higher rate of minority admissions and thus minimize perpetuation of past segregation.

NYCHA responds that, while this proposal may advance income integration, it would frustrate the goal of increasing the proportion of rentals to working families. However, NYCHA presents no evidence that the

implementation of local preferences that favor Tier II and III families over Tier I families would not in itself increase the proportion of working families. Since it is plausible that Tier II and III applicants have higher incomes because of employment, it seems likely that increasing the number of such families admitted would have precisely this effect. Thus, NYCHA has failed to carry its burden of demonstrating that a less-discriminatory alternative would not advance its claimed interest. Moreover, NYCHA has considerable flexibility in implementing local preferences and has presented no reason that it could not adopt yet other measures that would increase working family rentals without perpetuating segregation.

It also appears that NYCHA could eliminate the objectionable perpetuation of discrimination by making revisions to their plan that are even less drastic than those proposed by plaintiffs. The Working Family Preference could be instituted in essentially the proposed form, provided white applicants selected under the preference are not placed in projects in which whites are over-represented relative to the applicant pool. The extent to which such a modification would be administratively feasible or desirable is, of course, a question for NYCHA.

In order to effectuate the purposes of the decree, NYCHA will be enjoined from implementing the Working Family Preference as proposed. However, NYCHA will be permitted to seek modification of the injunction to permit a Working Family Preference that will not affect desegregation at predominantly white projects.

III. *Expansion of Project Choice*

A. *Deference to HUD Approval*

NYCHA contends that HUD's limited-term approval of the proposed expansion of Project Choice is entitled to judicial deference. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984), the Supreme Court held that considerable weight should be given to an agency's construction of a statutory scheme that it has been entrusted to administer. HUD's interpretation of the Fair Housing Act "ordinarily commands considerable deference" because "HUD [is] the federal agency primarily assigned to implement and administer Title VIII." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979); *see also Pfaff v. United States Dep't of Housing & Urban Devel.*, 88 F.3d 739, 747 (9th Cir. 1996).

A court defers to an agency's findings of fact where they are reasonable and supported by substantial evidence on the record as a whole. *NLRB v. Gordon*, 792 F.2d 29, 32 (2d Cir. 1986), *cert. denied*, 479 U.S. 931 (1986); 5 U.S.C. § 706(2)(E). Substantial evidence is something less than the weight of the evidence, and the possibility of drawing inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

However, the "substantial evidence" standard applies only to agency decisions made upon a formal hearing required by statute. *See National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 700-01 (2d Cir. 1975), *cert. denied*, 423 U.S. 827 (1975); *Aircraft Owners & Pilots Ass'n v. Federal Aviation Admin.*, 600 F.2d 965, 969-70 (D.C. Cir. 1979). When an informal admin-

istrative adjudication is being reviewed, the appropriate standard is the more deferential test of whether the agency's action is arbitrary, capricious or an abuse of discretion. *See Castillo v. Army & Air Force Exchange Service*, 849 F.2d 199, 203 & n.1 (5th Cir. 1988).

B. *Plaintiffs Have Not Established that the Expansion of Project Choice Would Violate the Fair Housing Act*

HUD has concluded, as a factual matter, that the proposed expansion of Project Choice is "not likely to affect the racial identifiability of developments in New York City for the remaining period of the *Davis* TSAP." By approving the proposal, HUD effectively concluded that the expansion of Project Choice does not violate Title VIII.

Technically, this motion is not an appeal pursuant to the Administrative Procedure Act. In effect, however, consideration of the motion amounts to judicial review of HUD's approval of the expansion of Project Choice to larger apartments. Accordingly, HUD's determination will be subjected to the degree of judicial scrutiny applied to agency actions in the ordinary appeal context.

The approval of the proposed expansion of Project Choice was granted after an informal procedure involving the review of paper submissions. There was no formal, statutorily-required hearing or formal record developed. Thus, this Court reviews HUD's factual determinations for arbitrariness, capriciousness or abuse of discretion.

HUD's action here was not arbitrary or capricious. HUD reviewed NYCHA's submissions and had sufficient data at its disposal to assess the effect of the proposed expansion of Project Choice on the racial identifiability of NYCHA projects.

Plaintiffs contend that this Court should not defer to HUD's approval for a variety of reasons. First, they note

that HUD does not ordinarily permit Project Choice and has granted a waiver under the Consent Decree only as a limited term "demonstration" project. They cite to *Jaimes* in support of their contention that Project Choice rules tend to perpetuate past discrimination in violation of Title VIII by permitting white families to choose to concentrate in primarily white projects. *See* 715 F. Supp. at 841 (policy permitting applicants to refuse offered apartments three times maintained segregation in violation of Title VIII); *see also Jaimes v. Toledo Metropolitan Housing Auth.*, 758 F.2d 1086, 1108 (6th Cir. 1985) and *Jaimes v. Toledo Metropolitan Housing Auth.*, 833 F.2d 1203, 1206 (6th Cir. 1987) (affirming finding of liability for perpetuation of discrimination).

While HUD's normal reluctance to permit Project Choice and *Jaimes*'s holding both reflect the potential problems with Project Choice rules, it does not establish a *per se* rule against such plans. In fact, plaintiffs conceded at oral argument that Project Choice would be unobjectionable in the absence of past discrimination. In *Jaimes*, the Court concluded that the plan would maintain segregation, and considered whether the percentage of white families in segregated projects was decreasing in coming to that conclusion. 715 F. Supp. at 841. Here, in contrast to *Jaimes*, all of the projects identified by plaintiffs as having disproportionately large white populations[5] are desegregating. According to plaintiffs' own expert, only seventeen additional white families would be eligible for Project Choice under the proposed TSAP, and of those only 8.3 would move into developments that are more than 10% white. This is a tiny fraction of

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[5] Plaintiffs include projects that are more than 10% white among the "racially identified" projects, even though only projects that are greater than 30% white are considered racially-identified under the TSAP. In *Jaimes*, the court identified projects that were more than 45% white as unbalanced.

the 1,885 three- and four-bedroom apartments rented by NYCHA in 1995. The eight additional families are also dwarfed by the 880 white families per year leaving projects that are over 30% white and the 800 families per year leaving projects that are over 10% white. Plaintiffs have not produced any evidence that the "influx" of eight additional white families will have any significant effect on the process of desegregation at any of these "white" projects[6], as they have with the Working Family Preference. The effect of expanding Project Choice is *de minimis*, and thus does not establish a *prima facie* violation of Title VIII. *See In re Malone*, 592 F. Supp. 1135, 1167 (E.D. Mo. 1984), *aff'd*, 794 F.2d 1283 (8th Cir. 1986).

Plaintiffs, however, urge consideration of the effect of not only the proposed expansion of Project Choice, but the effect of existing Project Choice for small apartments combined with the expansion to large apartments. However, a challenge to the effect of Project Choice for smaller apartments is precluded by the terms of the Consent Decree. Including the effects of Project Choice for smaller apartments in deciding this motion would exaggerate the effect of the proposal actually before the Court and impermissibly undermine the terms of the Consent Decree that permitted Project Choice for smaller apartments.

Plaintiffs finally contend that HUD did not have sufficient evidence before it to assess the "clustering" effect

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[6] While plaintiffs have shown that the Working Family Preference would significantly slow or halt the desegregation process at eleven predominantly white projects, they have failed to make such a showing with respect to the expansion of Project Choice. The fact that the proposed expansion would result in a statistically significant difference in the distribution of white families to "white" projects does not mean that the change in distribution would have the effect of perpetuating past segregation at these projects, which would apparently continue to desegregate at a rapid pace.

of Project Choice. If HUD had approved the proposed expansion of Project Choice without essential data, its action would have been arbitrary, and thus, subject to reversal on appeal. However, HUD had before it the existing TSAP, the proposed TSAP changes, and data reports routinely submitted by NYCHA. These data were sufficient to make an informed decision on the effect of the proposed expansion of Project Choice. Moreover, this Court's independent review of the parties' submissions supports HUD's conclusion.[7]

Accordingly, the proposed expansion of Project Choice will not be enjoined.

IV. *Irreparable Harm*

When a plaintiff establishes likelihood of success in proving housing discrimination, a rebuttable presumption of irreparable injury arises. *See Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423-24 (11th Cir.), *cert. denied*, 469 U.S. 882 (1984); *Bronson*, 724 F. Supp. at 153 (citing *Gresham*); *cf. Town of East Haven*, 70 F.3d at 224 (denial of job opportunities may constitute irreparable harm for purposes of issuing preliminary injunction in Title VII case; inability to displace white workers if liability is later found justifies issuance of preliminary injunction).

As discussed above, plaintiffs have established a likelihood of success on the merits of their claim that the Working Family Preference would perpetuate segregation in eleven predominantly white projects. NYCHA contends that because the plaintiffs do not identify the individuals

[7] Plaintiffs also contend that the extension of Project Choice will encourage more white families to apply for housing and that a large portion of these additional families will choose white projects. Plaintiffs have provided no statistical support for this assertion. If such a trend should materialize, Plaintiffs may seek an injunction at that time.

harmed or the particular apartments of which they are deprived, the allegations are too speculative to support a finding of irreparable harm. However, it is not necessary to identify particular apartments or plaintiffs to obtain injunctive relief. In cases relying on statistical evidence to challenge discriminatory practices, it can rarely be determined precisely who has been harmed by what precise deprivation, but preliminary injunctions in such cases are permissible. *See Town of East Haven*, 70 F.3d at 224.

Accordingly, NYCHA has failed to rebut the presumption of irreparable harm arising from the perpetuation of segregation that would likely be caused by the Working Family Preference.

Conclusion

Upon the above findings of fact and conclusions of law the plaintiffs' motion is granted in part and denied in part. Specifically, the motion to enjoin implementation of the proposed Working Family Preference as proposed will be granted. However, NYCHA is granted leave to apply for a modification of the injunction upon a showing that the Working Family Preference will be implemented in a manner that will not affect desegregation in projects with a disproportionately high rate of white occupancy. The motion to enjoin the implementation of the proposed expansion of Project Choice will be denied.

Settle order on notice.

It is so ordered.

New York, N. Y.
July 17, 1997

ROBERT W. SWEET

ROBERT W. SWEET
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Dated: December 30, 1992

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90 Civ. 0628 (PNL)

PAULINE DAVIS, CYNTHIA WILLIAMS, CORNELIA SIMMONS AND KIM RIVERA, on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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92 Civ. 4873 (PNL)

UNITED STATES OF AMERICA,

Plaintiff,

—against—

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

OPINION AND ORDER

PIERRE N. LEVAL, U.S.D.J.

On July 1, 1992, the parties to these actions filed a proposed consent decree resolving all claims of the plaintiffs and the proposed plaintiff-class. This court directed the Housing Authority to give notice of the proposed settlement to the plaintiff-class and, because the interests of non-parties might be affected by the decree, *see In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1026 (2d Cir. 1992), to other interested persons as well. Notices were posted in all residential public housing buildings, published in three newspapers, and mailed to over 200 hundred entities and organizations.

Pursuant to Fed. R. Civ. P. 23(e), a hearing on the fairness, reasonableness, and adequacy of the proposed settlement was scheduled for November 6, 1992. Sixty-four written comments were received prior to the hearing,[1] 58 of which supported the proposed settlement or sought to file claims for relief under it. On October 30, 1992, plaintiffs and the defendant submitted papers responding to the written comments and supporting the fairness and adequacy of the proposed decree.

At the Rule 23(e) hearing on November 6, all persons in attendance who wished to speak were permitted to do so, whether or not they had submitted written comments prior to the hearing. The court heard oral objections from two Staten Island City Council members and counsel for one of them, and statements in support of the settlement from numerous class members, and one fair housing organization. The court permitted all interested persons to supplement their objections with additional

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[1] Although one comment arrived approximately 30 days after the final date for receipt of written statements, the court accepts it as a late-filed comment. *See Weinberger v. Kendrick*, 698 F.2d 61, 69 n.10 (2d Cir. 1982) (Friendly, J.), *cert. denied*, 464 U.S. 818 (1983).

written statements on or before November 11, 1992. Three such statements were received.

The "central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable and adequate." *Weinberger v. Kendrick*, 698 F.2d at 73. The "primary concern" entails a comparison of the terms of the compromise with the likely rewards of litigation. *Id.* Attention must also be paid "to the negotiating process by which the settlement was reached," including whether the agreement is the result of arm's-length negotiations, and whether plaintiffs' counsel possessed the requisite experience and ability and engaged in discovery necessary to effective representation of the class' interests. *Id.* at 74. The interests of non-parties must likewise be considered. *In re Masters Mates & Pilots Pension Plan*, 957 F.2d at 1026.

Although "to avoid a trial it is not necessary to conduct one," *see Weinberger*, 698 F.2d at 74, "findings and conclusions should be made with respect to every controverted settlement in order to permit intelligent review." *Plummer v. Chemical Bank*, 668 F.2d 654, 659 (2d Cir. 1992). Among the factors for consideration are (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; the risks of establishing (4) liability and (5) damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974); *see also Weinberger*, 698 F.2d at 73-74.

After reviewing the proposed settlement in light of these standards, including all declarations and statements in support of and in opposition to it, documentary and statistical evidence, and all matters presented at the hearing, the court approved the decree by order entered on November 16, 1992. The court now makes the following findings of fact and conclusions of law.

Plaintiffs' evidence supports their allegations that during specified periods of time the Housing Authority selected and assigned applicants for public housing, and tenants requesting transfers, to certain housing projects using methods that resulted in unlawful discrimination against Blacks and Hispanics. These methods included (1) the intermittent use of codes denoting housing projects to which only white families could be assigned; (2) the use of zip code and other geographic restrictions on admission to projects; (3) the use of racial goals or targets when new projects were "rented up" and on an ongoing basis thereafter; and (4) the assignment of families to projects where vacancies were not expected to arise. The evidence submitted by plaintiffs also supports their allegations that one or more of these practices continued during the period addressed in the Consent Decree (1983 through 1990, and on Staten Island through May 1991).

The court is satisfied that the decree will afford redress for these practices for a substantial portion of the plaintiff-class. Under the decree, the Housing Authority will provide priority placement at 31 public housing projects ("Affected Developments") for 1,990 families adversely affected by discrimination since 1985, together with moving expenses and utility reconnection costs for those class members who changed addresses since their eligibility interview; these expenses and costs will be paid directly to the providers on behalf of the class

members. The 1,990 figure represents a reasonable estimate of the number of families who were adversely affected since 1985 based on statistical analyses of the relevant applicant pools. The potential value of moving expense benefits and utility reconnection costs paid on behalf of class members is estimated at roughly $1.1 million.

Under the decree, the United States Department of Housing and Urban Development ("HUD") will also provide contract authority for 200 Section 8 housing vouchers for use in the private housing market by families who were adversely affected by discrimination in 1983 or 1984. Any unused vouchers could be claimed by class members from subsequent years. In consideration of this contribution by HUD, the plaintiff-class releases HUD from claims that relate to or arise out of HUD's relationship to the tenant selection practices of the Housing Authority during the relevant period. If the 200 Consent Decree vouchers remain under contract for an average of 15 years, their estimated value to the class would be roughly $24 million. The plaintiffs calculate that the 200 figure, while lower than the number of potential class members during 1983 and 1984, represents a reasonable estimate of the number of class members from that time period who are likely to be identified and located, found eligible, desirous of participating in relief, and not otherwise eligible as post-1984 class members.

A new Tenant Selection and Assignment Plan ("TSAP") will prohibit the past practices challenged in the complaints and provide for enhanced information to all housing applicants. This information will include a new "project information book" containing information on the location of housing projects and, for each project, the nearest transportation, schools, hospitals, public services such as child care, and accessibility of apartments for

the mobility impaired. Data from the project information book would be posted on maps in the Housing Authority Applications Department. Lists depicting the locations of all projects where vacancies are expected to arise, and describing the location of each project, would be publicly available and could be taken home by applicants for review. These changes will permit public housing applicants to make more informed housing choices. Black or Hispanic families who may be unaware of housing opportunities in neighborhoods unfamiliar to them, and who may, through lack of knowledge, have failed to request assignment to some housing projects, would especially benefit.

In light of the value of these benefits to the plaintiff-class and the potential risks and delays associated with litigation, I am convinced that the compromises made on behalf of the plaintiff-class members were reasonable. Those compromises consist primarily of the waiver of payment of monetary damages, except for monetary damages to the named plaintiffs and moving expenses and utility reconnection costs paid on behalf of unnamed class members; partial relief for the 1983-1984 time period; and the exclusion of relief at a number of largely non-white housing projects in East Harlem. The waiver of additional monetary damages, over and above moving expenses and utility reconnection costs paid on behalf of unnamed class members, was reasonable in light of the value of other remedial relief to class members. Partial relief for the 1983-1984 time period, and excluding a small number of additional housing projects in East Harlem, was justified in light of the litigation risks and potential delays associated with these claims. The payment of monetary awards to the named plaintiffs was reasonable in light of the costs and burdens associated with their participation in the litigation. *Cf. Grant v.*

Bethlehem Steel Corp., 823 F.2d 20, 24 (2d Cir. 1987) (upholding modest awards to name plaintiffs).

The remaining factors also support approval of the settlement. The settlement was the result of intense and protracted arm's-length negotiation. Submissions in support of the settlement demonstrate the requisite discovery and experience of counsel necessary for effective representation of the class.

Although some objectors have asserted that the settlement could affect the interests of non-class members, particularly some families currently on the waiting lists of Affected Developments, any effect that it might have is both consonant with the Fair Housing Act and equitable to non-class members. The settlement will reserve one out of every four vacancies at Affected Developments for non-class members. This compromise between the interests of class members and non-class members is a reasonable one. The power of the court to order relief for victims of discrimination is broad: the Act authorizes the court to issue "any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate)." 42 U.S.C. § 3613(c)(1). Moreover, there is legal support for affording all class members remedial relief by giving them priority placement ahead of non-victims of discrimination. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 774-76 (1976); *see also Jones v. Amalgamated Warbasse Houses, Inc.*, 97 F.R.D. 355, 361 (E.D.N.Y. 1982) ("Outsiders are not being forced to forfeit their status as members of the list; rather, they merely may have to wait somewhat longer for an apartment. This potential delay is not legally significant and therefore does not provide a basis for disapproving the settlement.") (citing *Franks*). In addition,

most families on current waiting lists at the Affected Developments had later interviews than the large majority of class members, and thus would have been housed after such class members. Priority placement for class members therefore helps to restore the *status quo*. Further, most families on current waiting lists will be housed prior to class members in any event because of inevitable delays associated with implementation of the decree. Finally, some non-class members on waiting lists of Affected Developments enjoy such status because of the practices challenged in these cases. I am therefore satisfied that the settlement does not illegally discriminate against individuals currently on waiting lists for public housing.

Several persons, including three members of the New York City Council from Staten Island (the "objectors"), oppose this settlement. The court has considered their contentions, both written and oral, and finds their objections to be without merit.

One objector contends that the incorporation in the settlement of a new TSAP usurps a legislative function of the New York City Council, and that Council members should have been invited to participate in the negotiating process. This is not correct. The Housing Authority is an independent public corporation created by New York State Law, and neither the New York Public Housing Law, see N.Y. Pub. Hous. Law § 401 *et seq.*, nor any other provision of law requires the Housing Authority to consult the New York City Council or to obtain its approval before adopting a TSAP. In any case, the objectors have been afforded an opportunity to comment on the proposed settlement, and the court has carefully considered their views and the views of those for whom they speak, including persons who are currently on the waiting list for public housing.

Two objectors raise various objections to the parties use of statistics in negotiating the number of vacancies to be allocated to class members at the Affected Developments on Staten Island. The objectors assert that statistics concerning Staten Island demonstrate an absence of discrimination at the projects in that borough. Evidence presented by the plaintiffs, however, shows discrimination there. The plaintiffs presented direct evidence of discrimination on Staten Island, such as improper practices at the special Staten Island Applications Office and the failure to report expected vacancies at the largely white Staten Island projects. This direct evidence is corroborated by statistics adduced by the plaintiffs. While only 15.4% of the total population of Staten Island is Black or Hispanic, the percentage of Blacks to Hispanics among non-elderly applicants who seek to live in public housing on Staten Island exceeds 70%. Move-in data at the 11 Housing Authority projects on Staten Island demonstrates that, at the five projects where racial occupancy controls were not imposed, approximately 85% of the families that moved in between 1985 and 1990 were Black or Hispanic. In contrast, at the six projects where the plaintiffs contend whites received admission preferences, white families constituted almost 70% of the move-ins during that period. Because the rate of Black and Hispanic applicants moving to Staten Island far exceeds their proportion in the residential population of Staten Island in general, it was appropriate for the parties to take this into account in conducting their statistical analysis. I am satisfied that the statistical calculations in connection with Staten Island were reasonable.

Two objectors complain that the remedial relief will damage the socio-economic balance of the Affected Developments by requiring the assignment of homeless families to these projects. However, there is no evidence

that the socio-economic mix of the class members will differ in any way from the population already in public housing or on waiting lists for public housing. In addition, one in four slots will go to those on the waiting list during the administration of the remedial relief.

One objector points out that the settlement does not require that class members prove that they applied to live in one of the Affected Developments. However, the settlement does require that the class members establish that they requested or would have requested housing at one of the Affected Developments. This standard is reasonable in light of the showing that the Housing Authority failed to advise Blacks and Hispanics of anticipated vacancies at a number of the Affected Developments and engaged in other discriminatory practices. Moreover, the settlement contains significant procedural requirements that class members must meet in order to qualify for an apartment.

Finally, an objection filed on behalf of the Hasidic community in Brooklyn asserts that various provisions of the Tenant Selection and Assignment Plan will have a disparate impact on that community. However, the challenged provisions of the TSAP, concerning various conditions on project choice for smaller and larger apartments, appear to be reasonable and justified by considerations facing the Housing Authority. In addition, the objector points to no constitutional, statutory, or other right violated by these provisions of the TSAP.

A number of the objectors' contentions may be rejected summarily: (1) There is no evidence that the notice to potential class members under the Consent Decree will encourage false claims; (2) there is no evidence that the parties will be unable to identify class members with reasonable precision given the evidentiary standards set forth in the Consent Decree; (3) contrary to the objec-

tors' assertions, the Consent Decree does not dispense with the Housing Authority's eligibility requirements; (4) the moving expenses that will be paid under the Consent Decree are not a "windfall" to class members, but rather are a reasonable means of paying for the additional expenses class members would incur in receiving relief under the Consent Decree. (And, these expenses will be paid directly to the moving and utility companies, not to the class members.)

The court has considered all the other oral and written objections submitted to it, and has concluded, for reasons set forth in the parties' submissions and at oral argument, that the objections lack merit. The settlement is hereby approved.

Dated: New York, N.Y.
December 30, 1992

SO ORDERED:

PIERRE N. LEVAL
Pierre N. Leval, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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90 Civ. 628 (PNL)

PAULINE DAVIS, CYNTHIA WILLIAMS, CORNELIA SIMMONS, AND KIM RIVERA, on behalf of themselves and all others similarly situated,

Plaintiffs,

—v.—

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

---

92 Civ.

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

CONSENT DECREE

WHEREAS, the United States filed a complaint seeking relief against the New York City Housing Authority (the "Housing Authority") under Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. §§ 3601 *et seq.* (the "Fair Housing Act"); and

WHEREAS, the plaintiffs in *Davis v. New York City Housing Authority,* 90 Civ. 628 (PNL) (the "*Davis* plaintiffs") have filed a complaint against the Housing Authority alleging discrimination on the basis of race, color, and national origin in the selection and assignment of public housing tenants; and

WHEREAS, the United States Department of Justice is authorized, pursuant to 42 U.S.C. § 3614, to commence civil actions seeking enforcement of the Fair Housing Act on behalf of persons who may have been affected by such alleged violations; and

WHEREAS, the Secretary of the United States Department of Housing and Urban Development ("HUD") is authorized, pursuant to 42 U.S.C. §§ 3610 and 3612, to receive complaints of violations of the Fair Housing Act, to investigate such complaints and to commence civil proceedings seeking enforcement of the Fair Housing Act on behalf of persons who may have been affected by such violations; and

WHEREAS, HUD requires all public housing agencies to submit their tenant selection and assignment plans to it for approval; and

WHEREAS, the United States and the *Davis* plaintiffs (the "plaintiffs") contend that the Housing Authority pursued policies and practices that discriminated against Black and Hispanic applicants who sought or were

denied consideration for housing in certain Projects owned by the Housing Authority on the basis of their race, color, or national origin; and

WHEREAS, the United States and the *Davis* plaintiffs allege that such policies and practices involved a variety of mechanisms including racial and ethnic quotas, racial balancing programs, neighborhood restrictions, and other limitations or restrictions on the number of minority families that would be permitted to reside at certain Projects; and

WHEREAS, the Housing Authority denies all of the allegations in both complaints; and

WHEREAS, the United States, the *Davis* plaintiffs, and the Housing Authority desire to avoid protracted, expensive, and unnecessary litigation, and share the mutual goal of ensuring equal housing opportunities for all applicants for public housing without regard to race, color, or national origin; and

WHEREAS, the parties recognize that the Housing Authority is the largest public housing agency in the United States, operating more than 320 projects and approximately 180,000 apartments which house some 500,000 persons, and that the process of screening, interviewing, selecting, assigning, and transferring applicants and tenants in such a large and diverse public housing system is complex and, therefore, intend that this Consent Decree take into account the unique problems and concerns that face the Housing Authority in administering such a large taxpayer-subsidized system in an efficient and cost-effective manner; and

WHEREAS, the parties agree to the jurisdiction of the Court over both the parties and the subject matter of these actions, and hereby waive, for purposes of entry of

this Consent Decree, the filing of an answer in *United States v. New York City Housing Authority*, 92 Civ. ___, and the entry of findings of fact and conclusions of law; and

WHEREAS, the parties agree that this Consent Decree shall not constitute an adjudication or admission by the Housing Authority of any violations of any law, executive order, or regulation; and

WHEREAS, this Consent Decree is to be final and binding as to plaintiffs' claims of alleged discrimination on the basis of race, color, or national origin and not as to issues that may arise under any other provisions of law, including any other provision of the Fair Housing Act, such as those dealing with the rights of the handicapped and families with children; and

WHEREAS, counsel for the United States and the *Davis* plaintiffs, and representatives of HUD have met with representatives of the Housing Authority and its counsel to discuss and review a new Tenant Selection and Assignment Plan ("TSAP") in settlement of this litigation; and

WHEREAS, the Housing Authority has agreed to adopt a new TSAP that reflects its commitment to insuring equal housing opportunities for all applicants without regard to race, color, or national origin; and

WHEREAS, in recognition of the size and complexity of the public housing system operated by the Housing Authority, the TSAP contains methods of selecting and assigning tenants that may vary from methods of selecting and assigning tenants that HUD has approved for other public housing authorities in the country; and

WHEREAS, the parties agree that a purpose of the TSAP is fully to comply with the non-discrimination

requirements of Title VI of the Civil Rights Act of 1964 ("Title VI") and the Fair Housing Act so as to ensure equal housing opportunities without regard to race, color, or national origin; and

WHEREAS, HUD has approved the TSAP for a five-year period as meeting the requirements of Title VI and HUD's implementing regulations governing non-discrimination on the basis of race, color, or national origin; and

WHEREAS, this Consent Decree shall not constitute approval by the plaintiffs of those aspects of the TSAP that do not relate to discrimination on the basis of race, color, or national origin, or any aspect of the TSAP beyond the five-year period the TSAP shall be in effect;

NOW THEREFORE, based upon the foregoing representations of the plaintiffs and defendant, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. *DEFINITIONS*

1. As used herein, the following terms shall have the following meanings:

a. "Affected Claimant" shall mean a Claimant who, having submitted a Claim Form during the Claim Period, has been found eligible for the remedial relief provided by this Consent Decree.

b. "Affected Developments" shall mean those Projects which are listed in the document annexed as Exhibit A.

c. "Applicant" shall mean in the case of new applicants, any person or family who submits an application, on the forms specified by the Housing Authority, seeking public housing. In

the case of transfer applicants, "Applicant" shall mean any person or family who submits a written request for a transfer, or oral request that is corroborated by a notation, form, or other document in his or her tenant file.

d. "Black Applicant" or "Hispanic Applicant" shall mean an Applicant who describes himself or herself as Black, or Hispanic, respectively.

e. "Claim Form" shall mean the printed form in English and Spanish by which Claimants assert their claims, a copy of which is annexed as Exhibit C, or any equivalent form or document that contains substantially all of the information sought in the printed form.

f. "Claim period" shall be defined as the period commencing on the date the first newspaper advertisement appears, pursuant to paragraph 12, and ending 120 days after the date the last newspaper advertisement appears.

g. "Claimant" shall mean any Black or Hispanic applicant who was interviewed by the Housing Authority for Conventional Public Housing during the Relevant Period and has submitted a Claim Form asserting that he or she was adversely affected by the Housing Authority's past tenant selection and assignment practices.

h. "Conventional Public Housing" shall mean any residential building, group of buildings, or units owned and operated by the Housing Authority pursuant to an Annual Contributions Contract or other operating subsidy agreement with HUD or the State or City of New York, provided, however, that any building, group of

buildings, or units that either (i) are included in a home ownership program; (ii) are designated for a population of tenants with special needs (elderly residents shall not be deemed to have special needs by virtue of their age alone); (iii) are to participate in special initiatives or innovative programs; or (iv) are tenanted in accordance with Section 8 of the United States Housing Act will not be considered "Conventional Public Housing" *provided the following criteria are met*: (a) such housing has been approved by either the federal, State or City governments; (b) applicable statutes and regulations authorize or permit the tenanting of those units other than under the TSAP and pursuant to separate admission standards; (c) tenanting of those units under the TSAP would be impracticable; (d) the Housing Authority has implemented a plan other than the TSAP for tenanting those units that complies with any applicable HUD regulations, including, when applicable, 24 C.F.R. § 1.4(b)(2)(ii) and (e) the Housing Authority obtains HUD approval under 24 C.F.R. § 1.4 b (2)(ii) for discontinuing use of the TSAP in tenanting (1) any non-federally funded projects, buildings, or units when such approval is required under Title VI, and (2) any federally funded projects, buildings, or units. Projects that constitute "Conventional Public Housing" under this definition as of the date of entry of this Consent Decree are identified in the January 1, 1991, New York City Housing Authority Project Data Book filed contemporaneously with this Consent Decree, but excluding Frederick Samuel Houses.

i. "Dwelling Unit" shall mean any apartment located in one of the Affected Developments.

j. "Priority Waiting List" shall mean the list of Affected Claimants at each Affected Development who will be housed pursuant to the remedial relief provisions of the Consent Decree.

k. "Project" shall mean any building or group of buildings providing Conventional Public Housing owned and operated by the Housing Authority at which apartments are rented to persons drawn from a single pool of certified applicants.

l. "Relevant Period" shall mean the period beginning January 1, 1983, and ending December 31, 1990. Such period shall extend to May 31, 1991, for Claimants who selected Staten Island as a borough of choice on their applications, or who applied at the Staten Island Applications Office. Affected Claimants who were interviewed between January 1, 1983, and December 31, 1984, shall only be eligible for Section 8 Consent Decree Vouchers as defined in paragraph 11 pursuant to contractual authority provided by HUD under this Consent Decree.

m. "Tenant Selection and Assignment Plan (TSAP)" shall mean the plan adopted by the Housing Authority, a copy of which is annexed as Exhibit B, pursuant to which it selects and assigns tenants for Conventional Public Housing.

With respect to the definitions in h and k, none of the parties shall be bound by such definitions beyond the five-year period in which the TSAP shall be in effect pursuant to this Consent Decree. Should the Housing

Authority move to modify this Consent Decree by changing the terms of the definitions in paragraphs h or k, the Housing Authority shall be required to comply with all applicable laws and regulations and to demonstrate in its motion that such modification will not violate the general injunctive provisions of Part III of this Consent Decree, and any objections to such modification under this Consent Decree shall be based solely on the ground that the proposed modification discriminates on the basis of race, color, or national origin. In the event that the Court finds that such modification will not violate the general injunctive provisions of this Consent Decree, the parties will not be permitted to raise any objection to such modification in this case.

II. *CLASS ACTION AND CONSOLIDATION*

2. The action in *Davis v. New York City Housing Authority* is certified as a class action pursuant to Fed. R. Civ. P. 23(b)(1) and (b)(2). The class shall be comprised of all Black or Hispanic Applicants, as defined in paragraph 1d, who applied for Conventional Public Housing during the Relevant Period, as defined in paragraph 1*l*.

3. The action in *United States v. New York City Housing Authority* is hereby consolidated with the action in *Davis v. New York City Housing Authority.*

III. *GENERAL INJUNCTIVE RELIEF*

4. The Housing Authority, its officials, agents, employees, and successors are permanently enjoined from engaging in any act or practice which denies equal access to its housing, conventional or otherwise, on the basis of race, color, or national origin, including:

a. adopting and implementing any tenant application, selection, assignment, and transfer plan, or any such policy or process, which gives preference to Applicants or tenants on the basis of race, color, or national origin;

b. refusing to rent or otherwise making dwellings unavailable to applicants or persons requesting transfers because of race, color, or national origin;

c. making statements with respect to the rental of dwellings which indicate a preference, limitation, or discrimination because of race, color, or national origin;

d. representing to Applicants or tenants that, because of race, color, or national origin, certain developments are not anticipating vacancies when such developments are, in fact, anticipating vacancies;

e. denying any request for transfer because of race, color, or national origin;

f. imposing any restrictions or limitations on the numbers of families that will be permitted to reside in any project (or on any floor or building within the project) because of race, color, or national origin; or moving any Applicant ahead of any other Applicant in scheduling an eligibility interview or on any waiting or assignment list because of race, color, or national origin;

g. moving any tenant who has requested a transfer from one Project to another ahead of any other tenant or Applicant on any waiting or assign-

ment list because of race, color or national origin; and

h. imposing any neighborhood or geographic requirement or preference, to the extent such requirement or preference is in violation of Title VI, the Fair Housing Act, or 24 C.F.R. § 960.204(e) (1991).

i. If, at any time after five years any federal statute or regulation shall explicitly permit any of the practices listed above, or shall be so interpreted by the United States Supreme Court, the Housing Authority shall be permitted to conform its practices to the existing law, and plaintiffs may move to oppose any such change or practice as inconsistent with the statute, amendment, or decision of the Supreme Court, or on the ground that it is otherwise illegal.

j. Nothing in this paragraph shall be deemed to prohibit the provision of remedial relief under this Consent Decree or remedial relief to any identified victims of past discrimination on the basis of race, color, or national origin who do not receive relief under this Consent Decree.

5. The Housing Authority shall adopt and implement the TSAP annexed as Exhibit B, which is hereby incorporated by reference. The TSAP will be implemented by the Housing Authority to prevent any unlawful discrimination on the basis of race, color, or national origin, in compliance with the Housing Authority's obligations therewith under Title VI, the Fair Housing Act and the implementing regulations and requirements of HUD. Any disputes with respect to the Housing Authority's compliance with its obligations to prevent any unlawful

discrimination on the basis of sex, religion, handicap, and familial status will be resolved independently of this Consent Decree.

6. The TSAP, and any changes or modifications to it, will be jointly monitored by the parties as set forth below:

a. The TSAP will be fully implemented within one year after the Court enters the Consent Decree, and will remain in effect for five years. Within the one-year period, the Housing Authority shall inform plaintiffs' counsel by certified letter that the TSAP is fully implemented and the five-year period shall begin on the date of the receipt of such letter. The plaintiffs will not challenge any conduct by the Housing Authority during the five-year period that is in compliance with the TSAP on the ground that it discriminates on the basis of race, color, or national origin.

b. If, during this five-year period, the Housing Authority finds it necessary to modify any provision of the TSAP, the Housing Authority will provide written notice to the parties at least sixty days in advance of the date that the proposed modification is to take effect. The notice shall include a full and complete description of the proposed modification, the reasons therefor, and the date upon which it is to take effect. If any party objects to the proposed modification on the ground that it may result in discrimination on the basis of race, color, or national origin, it may petition the Court to resolve the objection not earlier than 30 days from the date of the notice, and not later than ninety days

after such notice, provided such period may be extended by agreement of the parties or, absent such agreement, by the Court for good cause shown. Pending resolution by the Court, the Housing Authority may implement the proposed modification at its own risk, but without prejudice to the right of the plaintiffs to move the court to enjoin the proposed modification as inconsistent with the terms of this Consent Decree, and to seek full and complete relief for persons harmed by the changes, and any other appropriate relief authorized by the Fair Housing Act. Nothing in this paragraph shall be construed to relieve the Housing Authority of its obligation to obtain HUD approval of any modification to the TSAP pursuant to 24 C.F.R. § 1.4(b)(2)(ii). This provision does not create or diminish a private right of action that did or did not previously exist.

c. At the end of the five-year period, the Housing Authority may, at its own risk, continue to use the TSAP or modify it. For a period not to exceed three years following the end of the five-year period, the plaintiffs may move the Court to modify or otherwise enjoin any aspect of any TSAP implemented by the Housing Authority on the ground that it violates the Fair Housing Act, Title VI and/or HUD implementing regulations, to seek full and complete relief for persons harmed during the three-year period, and to seek any other appropriate relief authorized under the Fair Housing Act. Nothing herein shall be construed to relieve the Housing Authority of the requirements set forth in 24 C.F.R. § 1.4(b)(2)(ii) that HUD approve any

modifications in the Housing Authority's TSAP, or preclude HUD from pursuing any remedies it may have under its rules and regulations.

7. In adopting and implementing the TSAP attached hereto as Exhibit B, the Housing Authority agrees that, with respect to existing projects and new projects to be opened in the future:

a. it will use no racial quota system, or other practice, technique or device to house Applicants in particular projects, buildings, or apartments, or to otherwise limit the availability of housing, on account of race, color, or national origin;

b. no Applicant will be denied consideration based upon residence in a particular borough, neighborhood, zip code, or other geographic area at any stage of the application, certification, selection, or transfer process to existing projects, or in the rent-up of new projects.

c. no Applicant will be scheduled for an eligibility interview or certified, transferred, or otherwise referred to a particular Project for selection ahead of others awaiting interview or placement because of race, color, or national origin, except to the extent required by this Consent Decree.

8. No Applicant will be barred or disqualified from any Project tenanted under the TSAP because of any minimum income requirements that result in discrimination on the basis of race, color, or national origin in violation of Title VI or the Fair Housing Act; provided, however, that consistent with HUD's general occupancy standards, the Housing Authority may seek to achieve a tenant body in each Project composed of families with a

broad range of incomes, generally representative of the range of incomes and rent-paying abilities of lower income families in its geographic operating area to the extent permitted under 42 U.S.C. § 1437d(c)(4)(A)(iv), 24 C.F.R. § 960.205, and 24 C.F.R. Part 913. During the five-year period the TSAP shall be in effect, minimum income requirements may be employed at the Forest Hills Cooperative. If any new minimum income requirements are added to existing Conventional Public Housing Projects, plaintiffs shall have the right to challenge such a change during the five-year period or thereafter. During the five-year period and prior to that time, all of the Affected Developments shall remain Conventional Public Housing Projects.

9. This Consent Decree constitutes approval by the United States of the attached TSAP for the five-year period specified in paragraph 6 as meeting the requirements of Title VI and HUD's implementing regulations governing non-discrimination on the basis of race, color, or national origin.

IV. *REMEDIAL RELIEF FOR CLAIMANTS*

10. Recognizing that some of its past tenant selection and assignment policies and practices may have adversely affected certain Black and/or Hispanic Applicants who requested or were interested in placement at the Affected Developments, the Housing Authority has agreed to reserve 1,990 Dwelling Units for such applicants who establish a claim for relief under Part IV. The number and distribution of Dwelling Units to be offered to Claimants under this Consent Decree are set forth in Exhibit A.

11. HUD shall provide contract authority for 200 Section 8 vouchers ("Consent Decree Vouchers") to the

Housing Authority for use by Affected Claimants entitled to such vouchers under this Consent Decree. The Housing Authority shall, within ninety days of the entry of this Consent Decree, consistent with applicable requirements of the Section 8 Program, apply to HUD for the Consent Decree Vouchers and enter into an Annual Contributions Contract with HUD with respect thereto for a term of five years, renewable in the same manner provided by law for outstanding Section 8 vouchers generally. HUD shall approve such application when it finds that it complies with all applicable program requirements. HUD's ability to provide assistance under this paragraph is subject to the availability of funding from Congress and to the existence of statutory authority generally authorizing the provision of such assistance. In the event that a Consent Decree Voucher is assigned to an eligible Claimant who is later found ineligible for Section 8, dies, or surrenders the voucher, the Consent Decree Voucher shall be transferred to another Affected Claimant entitled to such voucher who has not yet received relief under this Consent Decree. Such transfer shall not be made after the expiration of this Consent Decree. The commitment to provide Consent Decree Vouchers under this paragraph shall be binding upon the United States and its agencies.

A. *Notice To Potential Claimants*

12. Within thirty days of the entry of this Consent Decree the Housing Authority will place an advertisement, a copy of which is annexed as Exhibit D, in the *Daily News*, the *Amsterdam News*, *El Diario* (in Spanish), the *Staten Island Advance* and the newspapers identified in the second page of Exhibit D hereto notifying potential Claimants of the availability of the relief provided by this Consent Decree. The advertisements will

appear in a form and type size to be agreed upon by the parties. The Housing Authority will place these advertisements once a week for six consecutive weeks in each of the four newspapers named above and in the newspapers identified in Exhibit D. The Housing Authority will also place the advertisement described above, in English and Spanish, in the *Housing Authority Journal* published nearest the dates the advertisement appears in the newspapers specified above.

13. Within thirty days of the entry of this Consent Decree, the Housing Authority will also post an 11" x 15" poster, a copy of which is annexed as Exhibit E in Spanish and English, on the public notice/bulletin board spaces of each project management office in the Housing Authority's system, including project community centers. This posting will only be done once. Copies of the poster will also be mailed or delivered, with a request that they be posted, to all New York City income maintenance and unemployment insurance benefit offices, and the organizations and community centers identified in Exhibit F. 250 posters shall be provided to counsel for the plaintiffs. The poster will inform Black and/or Hispanic persons of their right to obtain a leaflet in English and Spanish explaining the rights of potential Claimants to submit claims for individual relief under this Consent Decree. A copy of the leaflet is attached as Exhibit G. These leaflets, with attached Claim Forms, will be publicly available in each project management office. In addition, within 30 days after the commencement of the Claim Period, copies of the leaflet and attached Claim Form will be placed underneath the door of the apartment of every tenant in the conventional public housing system. Nothing in this Decree prohibits plaintiffs' counsel from distributing copies of these notices to other governmental and non-governmental agencies and orga-

nizations as they consider to be reasonable and appropriate or from making their text available to class members in other ways. Within 30 days after the commencement of the Claim Period, the Housing Authority shall complete mailing a copy of Exhibit G and the attached Claim Form to all applicants on certified waiting lists of Conventional Public Housing Projects.

B. ***Eligibility For Relief***

14. To be eligible for relief under Part IV, Claimants must:

(i) file a Claim Form pursuant to the procedures set forth in paragraphs 15 and 16;

(ii) be a Black and/or Hispanic Applicant;

(iii) have been interviewed during the Relevant Period by the Housing Authority for Conventional Public Housing or applied for transfer between Projects within the Conventional Public Housing system;

(iv) have been found eligible for Conventional Public Housing or, in the case of transfer applicants, met the eligibility criteria generally applied by the Housing Authority to transfer applicants;

(v) have requested or would have requested, placement in one of the Affected Developments at the time(s) of their eligibility interview(s) or, in the case of transfer applicants, sought a transfer to an Affected Development;

(vi) not have been offered housing, at the eligibility interview, at one of the Affected Developments; or,

in the case of transfer applicants, not permitted to transfer to one of the Affected Developments; and

(vii) in the case of Affected Claimants who receive Dwelling Units at Affected Developments, currently be eligible for certification or continued occupancy in Conventional Public Housing at the time the Claim is submitted pursuant to current Housing Authority eligibility or continued occupancy standards. Affected Claimants entitled to Consent Decree Vouchers must be eligible under Section 8 criteria.

15. Except for transfer Claimants, a Claimant may establish that he or she requested or, if he or she had been told about an Affected Development, would have requested placement at one of the Affected Developments at the time of the eligibility interview(s) by providing any reason that establishes a credible basis for concluding that the Claimant would have chosen the Affected Development at the time of the eligibility interview, including, but not limited to, showing that the Affected Development was located near: (i) the place of employment of the Claimant or a family member then residing in the household; (ii) a facility that provided medical or other services, not readily available elsewhere, for the Claimant or a family member then residing in the household; or (iii) the home of a close family member. The Housing Authority's Supplemental Interview Record, if available, will also be examined to determine whether a Claimant requested any of the Affected Developments at the eligibility interview(s), but the presence or absence of such documentation shall not be dispositive of whether such request was made.

16. To present a Claim, each Claimant must submit, in writing to the best of his or her recollection, the information required by the Claim Form to the Housing

Authority at the following address: New York City Housing Authority, Law Department, 11th floor, Room 19, 75 Park Place, New York, New York 10007. Claims will only be accepted if postmarked or hand delivered on or before the last day of the Claim Period. Claims may be supplemented no later than the 30th day after the close of the Claim Period.

C. *Analysis Of The Individual Claims*

17. On the 15th day of each month, the Housing Authority will provide copies of the claim forms received as of the last day of the previous month, and any documents presented by the Claimant in support of the Claim, to counsel for the United States and the *Davis* plaintiffs.

18. Within ninety days of the close of the Claim Period, or at such later date to which the parties agree, the Housing Authority will submit to counsel for the United States and the *Davis* plaintiffs a report listing the names, addresses, and social security numbers (if available) for all of the Claimants, including Claimants, if any, who the Housing Authority contends did not timely submit their claims, separately identifying those Claimants interviewed in the 1983-1984 time period and those interviewed thereafter, and, as to each Claimant, whether the Housing Authority accepts or rejects the claim, and for each rejected claim a summary of the reasons for rejecting the claim. For each claim that the Housing Authority accepts, it shall also provide (a) the year of eligibility interview or transfer request, (b) priority, and (c) date of application. If the number of filed claims exceeds 5,000, the Housing Authority may defer processing those claims in excess of the first 5,000 until it is reasonable to expect that such Claimants may obtain relief under this Consent Decree. To prepare its report,

the Housing Authority will conduct a good faith search of all of its records, including its files and electronically stored data, to locate any documentation relevant to each Claimant's claim. The Housing Authority agrees, subject to a confidentiality order, to allow plaintiffs access to all non-privileged documents and information relevant to each claim. Except for documents or information covered by the attorney-client privilege, the Housing Authority will identify all documents or information it claims are privileged and any disputes with respect to such claims will be resolved by the Magistrate Judge pursuant to paragraph 39.

19. The relief to be provided under Part IV shall be available only to Affected Claimants and all family members listed on the written application as living in the applicant's household at the time of the eligibility interview, certification, or transfer request, provided that nothing in this paragraph shall prohibit family members from residing with Affected Claimants consistent with Housing Authority rules and regulations. In no event shall members of the same applicant family be entitled to separate claims for relief.

20. Nothing in this Consent Decree shall permit or require the Housing Authority to provide a Dwelling Unit for an Affected Claimant that is not of the appropriate size (*i.e.* either too large or too small) for that Affected Claimant or for which the applicant does not qualify because of age or income restrictions for such unit.

21. Within ninety days after submission of the Housing Authority's report on the individual claims, or at such later date to which the parties agree, the parties will jointly submit a report to the Court identifying those Claimants ("Affected Claimants") who the parties agree

have made the requisite showing of entitlement to relief under Part IV and those who are deemed not eligible for relief. The report will also identify those Claimants, if any, as to whom the parties have been unable to agree with respect to their eligibility for relief. Those claims will be submitted to a Magistrate Judge for final determination pursuant to paragraph 39.

D. ***Notification to Claimants***

22. Within thirty days of the submission of the report to the Court, the Housing Authority will send letters to all of the Claimants identified in the report. The letters, copies of which will be provided to the plaintiffs, will be sent to the addresses listed on their Claim Forms (or any updated addresses provided to the Housing Authority), and inform them of the determinations made on their claims and the relief to be provided, if any. A copy of the letter to be sent to Affected Claimants is annexed as Exhibit H-1 for applicants in the 1985-1991 time period and H-2 for applicants in the 1983-1984 time period. A copy of the letter to be sent to ineligible Claimants is annexed as Exhibit H-3. A copy of the letter to be sent to Claimants whose claims will be submitted to the Magistrate Judge is annexed as Exhibit H-4. Eligible Claimants and disputed Claimants who were interviewed during the Relevant Period on or after January 1, 1985, will be asked to indicate on a self addressed, stamped postcard their first three choices of Affected Developments in rank order in which they wish to be housed under Part IV.

E. *Assignment Of Affected Claimants To Affected Developments*

23. The following procedures shall be followed in order to assign Affected Claimants to Affected Developments.

a. Within 45 days of the mailing of the letters to the Claimants pursuant to paragraph 22, the Housing Authority shall assemble the postcards received as of that date from the Affected Claimants indicating their project preferences. The names of those Affected Claimants will be placed on Priority Waiting Lists for the respective Affected Developments they identify as their first choices on those cards, and by the apartment size for which they qualify.

b. The Priority Waiting Lists shall be separated by apartment size, and within each list the Affected Claimants shall be ranked by the year in which they first received an eligibility interview or requested a transfer during the Relevant Period, and within each year by their current housing or transfer priorities, and within each priority by date of interview. The Housing Authority will then forward those lists to the project managers of the Affected Developments, with copies to counsel for the plaintiffs. The Priority Waiting Lists will be appropriately updated as additional cards are received from the Affected Claimants. In no event will an Affected Claimant be offered a Dwelling Unit if that Affected Claimant sends in a postcard after thirteen months from the date of the submission of the report to the Court under paragraph 21.

c. The Housing Authority shall provide counsel for the United States and the *Davis* plaintiffs once a month by the fifteenth day after the close of the previous month, with a list of Affected Claimants whose cards are received, their project choices, year of eligibility interview or transfer request, priority, and date of application.

24. Three out of every four vacancies in an Affected Development shall be filled by Affected Claimants in any one year, to the extent Affected Claimants are available to fill vacancies. First priority in filling vacancies at each Affected Development will be accorded (a) to the named plaintiffs, and (b) then to all other Affected Claimants eligible to fill apartment vacancies.

25. Plaintiffs will determine the order in which disputed claims will be presented to the Magistrate Judge. If the Claimant's claim is sustained by the Magistrate Judge, the Claimant shall be eligible to fill a future apartment vacancy at that Development under the procedures set forth in Part IV. If a Claimant prevails before the Magistrate Judge, the Claimant shall be entitled to reasonable attorneys fees to the extent permitted under 42 U.S.C. § 1988 and the Fair Housing Act. The existence of a dispute before the Magistrate Judge shall not result in the suspension of the assignment of Affected Claimants to the Affected Developments or their filling apartment vacancies under Part IV. If the Claimant's claim is denied by the Magistrate Judge, the slot shall be filled by the next Affected Claimant on the Priority Waiting List.

26. Subject to paragraph 29, the number of Claimants who may fill apartment vacancies under Part IV at any Affected Development shall be limited to the number

specified for each Affected Development in Exhibit A. Once an Affected Claimant has accepted and moved into a Dwelling Unit, that Affected Claimant will be removed from the Priority Waiting List, and the number of Dwelling Units to be offered to the Affected Claimants at that project will be reduced by one. The Housing Authority shall continue renting Dwelling Units to Affected Claimants under the terms of this Consent Decree until the Priority Waiting List for each Affected Development has been exhausted, or all the slots specified for that Affected Development on Exhibit A have been filled.

27. If the number of apartment vacancies identified in Exhibit A is not filled after the Priority Waiting List for an Affected Development has been exhausted, the Housing Authority will canvass Affected Claimants on the Priority Waiting Lists for other Affected Developments to determine whether any other Affected Claimants wish to be assigned to that Development. Canvassing by the Housing Authority shall be accomplished by polling the Priority Waiting List for Affected Claimants who requested that Development as either their second or third choice or who are on the Priority Waiting List at any Affected Development within the borough for which the canvassing is being done. The number of Affected Claimants selected for canvassing shall be based on the number needed to fill all unfilled slots on Exhibit A.

28. The first canvass shall be done by the Housing Authority. Any subsequent canvassing may be done by the plaintiffs, or either of them, at their own expense. At least 30 days prior to any such subsequent canvassing, plaintiffs shall notify the Housing Authority of such canvassing, the method of canvassing, and a copy of any canvass letters to be used. If, within 30 days after canvassing, there are no Affected Claimants who wish to be

housed at the Affected Development, the apartments at that Development shall be rented pursuant to the TSAP. No Affected Claimant will be transferred to a Priority Waiting List at another Affected Development after eight years from the date this Decree is entered.

29. If, after five years, one or more Affected Developments have unfilled slots as designated on Exhibit A, such slots shall be reallocated in alphabetical order among the Affected Developments that have Affected Claimants on their Priority Waiting Lists.

30. In addition to the relief to be provided to Affected Claimants, the Housing Authority agrees to pay directly to licensed moving companies identified by the Housing Authority the reasonable and necessary expenses, pursuant to the schedule annexed as Exhibit I, incurred by Affected Claimants who move into Dwelling Units provided pursuant to Part IV, and to pay the cost of reconnecting any utilities the Affected Claimants enjoyed at their prior apartments, except those Affected Claimants whose claims are based on a discriminatory denial of an interproject transfer request, and Affected Claimants who continue to reside at the address listed on their applications to the Housing Authority in effect at the time of their eligibility interviews held during the Relevant Period or other Housing Authority records reflecting such address. For Affected Claimants who live in the Housing Authority system and transfer to an Affected Development under Part IV, the Housing Authority shall arrange for the transfer of security deposits and proration of rents paid, as more fully set forth in Exhibit J annexed to this Decree. If no proceeding as described in paragraph 31 is pending, the Housing Authority shall move all household occupants into the new Dwelling Unit. No move under this Consent Decree shall waive any rights that the Housing Authority may have to proceed against

any Affected Claimant or household occupant on any ground whatsoever nor shall it waive any defenses to such proceedings that any Affected Claimant or household occupant may have.

31. In the event that any Claimant for a Dwelling Unit who resides in a Housing Authority project is or becomes a defendant in administrative proceedings pursuant to Housing Authority Termination of Tenancy Procedures, summary proceedings in the New York Civil Court, Housing Part, or civil forfeiture proceedings in any court, the claim will be processed without delay under the procedures set forth in Part IV, provided, however, any such Claimant who is deemed an Affected Claimant shall be eligible to receive a Dwelling Unit only if the charge, proceeding, or lawsuit is adjudicated or resolved by permitting the Claimant to continue occupying his or her apartment, and the Claimant has complied with all conditions required by the adjudication or resolution. However, if the charge or proceeding relates solely to the issue of unauthorized occupancy, the Affected Claimant and all household occupants may move into a Dwelling Unit, regardless of whether the Dwelling Unit would be overcrowded, *provided* that the Housing Authority waives no rights to continue or bring proceedings based on unauthorized occupancy. If the Housing Authority tenant is currently subject to some administrative condition on his or her tenancy in the old apartment (such as "eligible subject to the permanent exclusion of a family member," "probation," etc.), such condition shall continue in the new apartment with the same force and effect as in the old apartment.

32. All Affected Claimants, except those who are currently tenants of record (or their spouses) living in a Project, or who are on a Project waiting list will be required to appear for expedited eligibility interviews to be con-

ducted by the Housing Applications Department and, in the case of Claimants for a Housing Authority Dwelling Unit, will only be eligible for relief if they are found eligible for certification or continued occupancy for public housing pursuant to Housing Authority standards and procedures. Affected Claimants entitled to Consent Decree Vouchers must be eligible under Section 8 criteria. Affected Claimants who are on a project waiting list will be subject to the same eligibility standards and procedures the Housing Authority applies to all other applicants on project waiting lists. Affected Claimants have a duty to cooperate with eligibility interviewers and to provide all required information before they may receive the relief provided by this Consent Decree.

33. Affected Claimants who are certified to an Affected Development for an offer of a Dwelling Unit under Part IV of this Consent Decree, or who are offered a Consent Decree Voucher but who are subsequently found ineligible for public housing or a Consent Decree Voucher, respectively, may only challenge such a finding pursuant to Housing Authority procedures, which will be provided in an expedited manner. The Housing Authority will promptly notify the parties of any such determinations of ineligibility. If the Affected Claimant is dissatisfied with the Housing Authority's final determination on eligibility, the only review of such determination shall be by the Magistrate Judge. The standard of review shall be the same as applied in a proceeding pursuant to N.Y. C.P.L.R., Article 78. Affected Claimants who prevail in such review shall be accorded the priority for a Dwelling Unit or a Consent Decree Voucher to which they are entitled under the Part IV, subject to the availability of Dwelling Units or Consent Decree Vouchers. Plaintiffs will not recover attorney's fees for any contested determination of eligibility for

public housing or Section 8 assistance under this paragraph, except to the extent provided by law.

34. All notices to Claimants shall be given, by first class mail, to the address listed as the current address on the Claim Form. It shall be the responsibility of each Claimant to notify the Housing Authority of any changes in address by giving notice to the Housing Authority's Consent Decree Liaison named below, and the Claimant will be notified of this obligation on the Claim Form.

35. When a vacancy arises at an Affected Development in an apartment size for which there is an eligible Affected Claimant on the Priority Waiting List, that Claimant will be contacted by letter, a copy of which is attached as Exhibit H-5, to determine if he/she is interested in filling the vacancy or receiving a Consent Decree Voucher (if any are still available after they have been offered to all Affected Claimants under paragraph 38). Telephone inquiries may also be made in addition to the letter. If there is no response to the letter, the Housing Authority will send a certified letter informing the Claimant that if there is no response to that letter within two weeks of its receipt, the Claimant will be removed from the Priority Waiting List. An Affected Claimant who rejects the offer of a Dwelling Unit at an Affected Development or a Consent Decree Voucher, or who does not appear in response to notification that a Dwelling Unit or voucher is available, will be passed over on the Priority Waiting List and will not be eligible for another offer of an apartment or voucher under Part IV of this Consent Decree, unless the Claimant can demonstrate good cause (such as illness, or unwillingness to move during the school year of a child living with the Affected Claimant) for having rejected the Dwelling Unit or voucher, or for having failed to appear. A Claimant who is entitled to receive a Dwelling Unit may reject a

Dwelling Unit because the Claimant prefers a Consent Decree Voucher, if available, or may reject a Consent Decree Voucher because the claimant prefers a Dwelling Unit.

36. Counsel for the parties will jointly review any rejections of Dwelling Units by Affected Claimants and will make a good faith effort to determine whether there is a good cause for the rejection. If counsel are unable to agree, the matter will be submitted to the Magistrate Judge.

37. In the event that no Affected Claimant is available for the size of Dwelling Unit that becomes vacant, pursuant to the Housing Authority's occupancy standards as set forth in its Housing Applications and Management Manuals, the Housing Authority may rent such a Dwelling Unit pursuant to its TSAP.

G. *Receipt Consent Decree Vouchers*

38. Within 45 days of the mailing of letters pursuant to paragraph 22, the Housing Authority shall offer, by the letter set forth in Exhibit H-6, a Consent Decree Voucher to each Affected Claimant who was interviewed between January 1, 1983 and December 31, 1984, *provided* that such offers shall not exceed 200 as specified in paragraph 11. Such vouchers shall be offered in the order of the date of the Affected Claimant's original eligibility interview that is the subject of his/her Claim until the number of available vouchers has been exhausted. If there are insufficient Affected Claimants who were interviewed in 1983 and 1984, the Vouchers shall then be made available to Affected Claimants who are eligible for offers of Dwelling Units at Affected Developments in the order of the date of their original eligibility interviews. Such Affected Claimants shall be given a

choice of selecting the apartment or the Voucher as long as such Vouchers remain. A Consent Decree Voucher holder may request the Housing Authority to issue the holder a certificate in exchange for the housing voucher to the extent permitted by HUD rules and regulations at the time of such request. If the Claimant is unable to rent an apartment within 120 days of the date the Consent Decree Voucher was issued, the Housing Authority shall, upon request of the Affected Claimant consistent with the Housing Authority's usual practices, reissue the Consent Decree Voucher and Claimants and there shall be no appeal or review of such decisions in any court.

V. *DAMAGES PAID TO THE NAMED PLAINTIFFS*

40. Within 30 days after entry of this Consent Decree, the Housing Authority shall pay to the Legal Aid Society, on behalf of the named plaintiffs, $60,000 in satisfaction of the named plaintiffs' claims for monetary damages in *Davis v. New York City Housing Authority*. Such payment shall be exclusive of payments for moving costs and utility reconnection fees provided under this Consent Decree and shall not, when disbursed by the Society to the named plaintiffs or their family members, be counted as income by the Housing Authority pursuant to 24 C.F.R. 913.106(c)(3). Except as set forth in this Decree, no monetary payments shall be provided to any other members of the plaintiffs' class.

VI. *APPOINTMENT OF CONSENT DECREE LIAISON*

41. The Housing Authority shall designate one of its employees to serve as Consent Decree Liaison. The Consent Decree Liaison will be responsible for implementing and monitoring compliance with all aspects of the

Consent Decree, including compliance with the TSAP for such period of time as any obligations continue under this Consent Decree. The Housing Authority shall provide its Consent Decree Liaison with the authority and staff to fulfill these duties, and shall notify the plaintiffs of the name, mailing address, and office telephone number of this person within thirty days of the date of entry of this Consent Decree. In the event this person resigns or is otherwise removed from this position, the Housing Authority shall appoint a replacement and provide notice of the new appointment to the plaintiffs within 30 days.

42. The United States designates the Chief of the Housing and Civil Enforcement Section of the Civil Rights Division of the United States Department of Justice and the Chief of the Civil Rights Unit of the Office of the United States Attorney for the Southern District of New York as its principal contact persons on all matters pertaining to this Consent Decree, or any persons designated by them. The *Davis* plaintiffs designate the Director of Litigation, Civil Appeals and Law Reform Unit, as their Consent Decree Liaison and principal contact person on all such matters.

VII. *RECORDKEEPING*

43. For a period of eight years and six months following entry of this Consent Decree, the Housing Authority shall retain the following records and information:

a. For each Applicant for Conventional Public Housing: name, application identification number, address (including zip code and borough); race/ethnicity; income and income tier; federal or local preference priority; whether the applicant's status is elderly/non-elderly and Com-

mand Center/non-Command Center; borough(s) selected for residence; the date of the eligibility interview; and the disposition of the application including reasons for declaring any applicant ineligible for public housing.

b. For non-Command Center applicants for apartments of two bedrooms or smaller, the Housing Authority shall retain the interview record forms used at the eligibility interviews and record the project selected at the eligibility interview, the date certified to the selected project, the date an apartment was offered, and, if the apartment was rejected, the reason(s) for rejection, the move-in date and move-out date.

c. For all applicants processed by the Command Center and Occupancy Control Division as set forth in the TSAP (Exhibit B), the Housing Authority shall record the project(s) offered, and, if a project is rejected, the reason(s), if any, for rejection, the project chosen, the move-in date, and move-out date.

d. For each tenant who applies for a transfer: name; address; Social Security Number or application identification number; race/ethnicity; reasons for seeking the transfer; date the transfer application was received; the project(s) to which the tenant seeks transfer (if any); the Housing Authority's determination of the tenant's eligibility and priority status for transfer; the project offered for transfer (if any); and the project chosen, date certified to the project, and move-in date.

e. For each Project (including Projects during rent-up): All Applicants (including transfer

applicants) certified to the project listed by name, race/ethnicity, whether elderly or non-elderly, applicant status (whether outside applicant or transfer applicant), income tier, priority, apartment size, date certified, move-in date, and move-out date.

f. For each project included in the project outreach or applicant outreach plan of the TSAP, the date the project was included in the plan, all applicants certified to the project pursuant to the plan identified by name, Application Identification Number, race/ethnicity, date certified, priority, income tier, whether elderly or non-elderly, and, for applications obtained under project outreach plan, the names of the projects from which those applications were received.

g. For the rent-up of new projects: the name and location of the project, the date the project was first placed on the Interviewers Guide and/or in the Applications Outreach Program, and the method by which applicants were obtained for the project (normal HATS waiting list and/or the applications outreach programs, as described in the TSAP).

h. For the Occupancy Control Division of the Housing Applications Department: the worksheets used every two weeks to determine the numbers of anticipated vacancies for each nine month period for all projects listed on the Interviewers Guide (including the number of applications at each project by unit size); all reports and correspondence from project managers concerning the preparation of the Interviewers Guides, copies of the Guides and any changes

or amendments to the Guides; record of the criteria used to pull applicants for eligibility interviews, including the Applications Outreach Program of the TSAP; lists used to certify applicants to vacancies in "larger apartments" as set forth in paragraph V D-2 of the TSAP, with the applicants on such lists identified by race/ethnicity; requests from projects to borrow applications from another project under the project outreach program of the TSAP, the name of the project, unit size requested, and date of such request, whether approved or disapproved by OCD, and, if approved, the name of the donating project.

i. For the Director of Housing Applications Department, requests from the Management Department to include projects in the applications outreach program of the TSAP, including the name of the project, unit size requested, date of such request, and whether approved or disapproved by the Housing Applications Department.

j. For the Research and Policy Division of the Housing Applications Department, move-in and move-out data by project, apartment size, and race/ethnicity.

k. For the Office of Audit and Program Analysis, the reports of all audits of compliance with the TSAP as set-forth in Part XI of the Plan.

l. For all claimants seeking remedial relief: Copies of all Claim Forms stamped to indicate the date received by the Housing Authority, all records and information obtained by the Housing Authority in its review of each Claim,

copies of all letters, with mailing dates, to Claimants under this Consent Decree.

m. Copies of all advertisements published pursuant to this Consent Decree.

VIII. *REPORT SCHEDULES*

44. For a period of eight years and six months following entry of this Consent Decree, the Housing Authority will provide to counsel for the plaintiffs at the addresses below semi-annual reports within thirty days after the end of each calendar half. Such reports shall consist of:

a. A copy of the Priority Waiting List Logs for each Affected Development. Such logs shall be marked to show the names of the Affected Claimants who have been provided Dwelling Units; the address of the Dwelling Unit provided to each of the Affected Claimants and the date they moved into it; or the date any Affected Claimants were removed from the Priority Waiting List for refusal to accept a Dwelling Unit or failure to answer a notice to accept a Dwelling Unit, and whether the Housing Authority has arranged for the transfer of security deposits and proration of rents paid for Affected Claimants who transfer to an Affected Development.

b. A list of all Affected Claimants who have received Consent Decree Vouchers.

c. A copy of the Management Turnover Logs (Housing Authority Form 1040.209) for each of the Affected Developments showing move-ins and move-outs by name, race/ethnicity, income

tier, applicant or transfer priority, whether elderly or non-elderly, and whether an Affected Claimant.

d. Copies of all City-referred emergency applicant reports, if any, to the extent such reports exist.

e. A copy of the TSAP and any changes or amendments to the TSAP adopted or implemented during the reporting period.

f. A list of all tenants who were permitted to transfer because they were living in under-occupied apartments showing the name of tenant, race/ethnicity of tenant, project transferred from and project transferred to.

g. Copies of Occupancy Control Division lists of applicants identified by race/ethnicity for "larger apartments" in each borough.

45. In addition, the Housing Authority will provide to the plaintiffs the following reports within thirty days after their publication:

(i) The semi-annual Tenant Statistics By Race;

(ii) The Annual Tenant data; and

(iii) Copies of Interviewers Guides.

46. The Housing Authority shall also provide to counsel for the United States one copy of the Housing Application Tracking System (HATS) and Tenant Data Systems (TDS) computer archive tapes, and to the Davis plaintiffs a redacted form of those tapes as specified in Exhibit K and pursuant to the Confidentiality Order in Exhibit K. Such tapes shall be produced within thirty days of the last business day of each year and shall contain all Applicant information electronically stored in the

computer system on that date, and technical documentation needed to read the tapes, such as record layout, description of variables, and definitions of all coded variables.

47. When sending letters or notices to Claimants under the Consent Decree, the Housing Authority will send copies to the plaintiffs' liaisons.

48. The plaintiffs may, in accordance with the standards of Rule 26 FRCP, request access to any other documents not specifically identified herein. Any such request shall be made in writing to the Housing Authority Consent Decree Liaison. If the Housing Authority disagrees with the propriety of any such request, the parties shall confer and attempt to resolve the matter. If agreement cannot be reached, either party may petition the Court to resolve the disagreement, in accordance with FRCP 26.

49. Copies of all notices, correspondence, reports or documents required to be provided by one party to the other under this Consent Decree shall be mailed to:

United States Department of Justice
Housing and Civil Enforcement Section
Rm. 7525
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Civil Rights Unit
United States Attorney's Office
Southern District of New York
100 Church Street
Nineteenth Floor
New York, New York 10007

The Legal Aid Society
Civil Appeals and Law Reform Unit
ATTN: *Davis* Consent Decree Liaison
11 Park Place, Room 1805
New York, New York 10007

Consent Decree Liaison
New York City Housing Authority
250 Broadway
New York, New York 10007

IX. *RETENTION OF JURISDICTION*

50. With the exception of the permanent injunctive provisions, this Consent Decree shall be dissolved eight years and six months after the date of entry.

X. *MISCELLANEOUS TERMS AND CONDITIONS*

51. In entering into this Stipulation, the Housing Authority admits no wrongdoing, nor any violation of any law alleged in the complaints and expressly denies that it committed any such violations. Nothing in this Consent Decree shall be deemed an admission that any past policy or practice of the Housing Authority knowingly or deliberately denied any person access to housing on the basis of race, color or national origin.

52. In consideration of the obligations of the Department of Housing and Urban Development ("HUD") as set forth in paragraph 11 above, the *Davis* plaintiffs on behalf of the certified class forego, release and discharge all claims against the United States or any of its officers or agencies (including but not limited to HUD) that relate to, concern, or arise out of the tenant selection and assignment practices of the Housing Authority during

the Relevant Period (as defined in the first two sentences of paragraph 11 above).

53. Any amendments or modifications to this Consent Decree shall be in writing and signed by each of the parties hereto.

54. Each party acknowledges that it has not relied upon any representations, warranties, or statements of any nature whatsoever, whether written or oral, made by any person, except as specifically set forth herein and that this Consent Decree represents the entire agreement of the parties. No prior agreements, oral representations or statements shall be considered a part of this Consent Decree.

55. Nothing in this Consent Decree shall be construed to relieve the Housing Authority of its obligation to comply with any federal or state statute or regulation. In the event that any party contends that any statute or regulation conflicts with the Housing Authority's obligations under this Consent Decree, such party may apply to the Court for clarification of the Housing Authority's obligations.

56. Nothing in this Consent Decree shall require any party to produce or provide material covered by attorney-client privilege and/or attorney work product.

57. Any applications to the Court under this Consent Decree shall be on notice to all parties.

58. If plaintiffs have reason to believe that the Housing Authority has violated the terms of this Consent Decree, plaintiffs shall notify the Housing Authority, in writing, sixty days prior to bringing any motion to enforce the Consent Decree, including a motion for contempt, *provided* however, a party may give less notice if it demonstrates to the Court that an emergency need prevented it

from giving the sixty-days notice and that the amount of notice it did give was required under the circumstances.

59. Remedial preferences for Affected Claimants required by Part IV of this Consent Decree shall not be deemed by the parties to violate the Fair Housing Act of Title VI of the Civil Rights Act of 1964, as amended.

XI. *ATTORNEYS FEES*

60. No costs or attorneys fees shall be awarded to the United States or the Housing Authority. The Housing Authority shall pay attorney's fees and costs to counsel for the *Davis* plaintiffs in an amount to be determined by the parties, or if no resolution is reached by the parties, by the Court.

62. The Housing Authority shall pay to counsel for the *Davis* plaintiffs $40,000 plus the cost of a toll-free telephone line with five rollover lines (exclusive of the installation costs) for the duration of the Claims Period in compensation for expenses to be incurred during the Claims Period.

AGREED TO:

THE LEGAL AID SOCIETY
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Jane E. Booth, Director of Litigation
Scott A. Rosenberg
Assistant Director of Litigation
Civil Appeals and Law Reform Unit
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(212) 344-5500
—*Of Counsel*—

Attorneys for Defendant
New York City Housing Authority

Dated:

Entered and Ordered this ___ day of _____, 19__

_____

UNITED STATES DISTRICT JUDGE

EXHIBIT A:

New York City Housing Authority: 31 Projects

PROJECT NAME	BOROUGH	ELDERLY	VICTIMS
Bay View	Brooklyn	Non-Elderly	204
Berry	Staten Island	Non-Elderly	111
Boston Road Plaza	Bronx	Elderly	35
Cassidy-Lafayette	Staten Island	Elderly	69
First Houses	Manhattan	Non-Elderly	5
Forest Hills Co-op	Queens	Partially	38
Fort Independence St	Bronx	Non-Elderly	15
Fulton	Manhattan	Partially	14
Glenwood	Brooklyn	Non-Elderly	141
Holmes Towers	Manhattan	Partially	52
Isaacs	Manhattan	Partially	39
Latimer Gardens	Queens	Partially	6
Meltzer Tower	Manhattan	Elderly	35
Middletown Plaza	Bronx	Elderly	63
New Lane Area	Staten Island	Elderly	59
Nostrand	Brooklyn	Non-Elderly	167
Parkside	Bronx	Non-Elderly	11
Pelham Parkway	Bronx	Non-Elderly	99
Pomonok	Queens	Non-Elderly	132
Randall Ave Balcom Ave	Bronx	Elderly	42
Ravenswood	Queens	Non-Elderly	14
Robbins Plaza	Manhattan	Elderly	45
Seward Park Ext	Manhattan	Partially	5
Sheepshead Bay	Brooklyn	Non-Elderly	89
South Beach	Staten Island	Non-Elderly	69
Strauss	Manhattan	Partially	5
Todt Hill	Staten Island	Non-Elderly	99
Vandalia	Brooklyn	Elderly	55
Vladek	Manhattan	Non-Elderly	141
W Brighton II	Staten Island	Elderly	29
Woodside	Queens	Non-Elderly	103
		TOTAL	**1,990**

EXHIBIT B

June 11,1992

The New York City Housing Authority's Tenant Selection and Assignment Plan

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The New York City Housing Authority's Tenant Selection and Assignment Plan

I. *INTRODUCTION*

The New York City Housing Authority has adopted this Tenant Selection & Assignment Plan (the "TSAP" or "Plan") to assure that it receives and processes applications for conventional public housing efficiently and in accordance with the laws.

II. *THE APPLICATION*

To be considered for conventional public housing each applicant must complete the Housing Authority's printed application. Applicants will be asked to select a first and second borough in which they wish to live, but may not request that their application be assigned to a particular project, defined as any conventional public housing building or group of buildings at which apartments are assigned from a single pool of certified applicants. Applicants who enter a project name in the space designated for the borough selections shall be deemed to have selected the borough in which the project is located. Applicants who fail to choose a borough shall be deemed to have chosen their borough of residence.

Upon receipt, each application shall be date and time stamped. Applications may be received and stamped both at the Housing Application's office and at its satellite offices. Applications will then be reviewed and assigned a priority code which identifies that applicant's need for housing, and the information on the application and its priority will be entered into the Housing Authority's computer data base. Information contained in applications assigned to priority codes 0 through 4 will be entered into the computer database in an expedited man-

ner by contrast with applications in the other codes. The application shall be filed by the applicant's Social Security number.

Applicants may simultaneously apply for conventional public housing and Section 8 housing and applications to both programs shall be processed concurrently.

III. *PRIORITIES FOR APPLICANTS*

A. *Method of Assigning Priorities*

In accordance with federal regulations, the Housing Authority has adopted priorities by which it ranks each applicant based upon the need for housing as expressed in the application.

Upon entry of the application information onto the computer database, the Housing Authority shall notify the applicant of the priority which has been assigned to the application and the procedures by which the applicant may obtain review of the decision. At any stage prior to rental, the Housing Authority may change the priority code if it is notified that an applicant's priority qualifications have changed. If the priority code is changed, the applicant will be so notified.

B. *The Priority Codes*

The priority codes adopted by the Housing Authority are:

Code 0

- Applicants who meet any of the requirements of Code 1 and who are referred to the Housing Authority by the New York City Human Resources Administration ("HRA") or by the New York City Department of Housing Preservation and Development ("HPD"), pursuant to

an agreement with the Housing Authority. These applicants are hereafter referred to as "City-Referred Emergency Applicants."

- Applicants about to be discharged from a hospital operated by the New York City Health and Hospitals Corporation, who would become homeless upon discharge and who are referred to the Housing Authority by HRA. Homeless applicants shall be defined as in 24 C.F.R. § 960.211(f)(3).

Code 1

- Applicants who have left their residences (and are not living in standard, permanent replacement housing) due to recent or continuing actual or threatened violence against them or their families by a member of their household, or applicants who live with someone who engages in such violence.
- Applicant families with one or more persons suffering from an illness or disability living in housing conditions that constitute a direct threat to such persons' lives due to their illness or disability.
- Applicants who live in hotels used by the City or shelters or whose primary nighttime residence is a place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.
- Applicants about to be displaced due to action taken by a landlord, including but not limited to eviction orders, unless the displacement is due to a rent increase or the applicant's failure to meet all the conditions of occupancy.

- Applicants living in housing declared uninhabitable by HPD or another government agency, or already displaced due to such a government order and not living in standard permanent replacement housing.
- Applicants about to be displaced by a government order from a site to be used for a public housing project or other public improvement.

Code 2

- Applicants with a family member cooperating in a criminal investigation/prosecution, where a member of the household has been threatened by a defendant in that investigation/prosecution, or by a person associated with a defendant. To qualify for this category, the prosecutorial or police agency involved in the case must certify to the Housing Authority that:
  a. the threat was made and was in retaliation for past or present cooperation with a prosecutorial or police agency;
  b. the threat poses a serious risk to a member of the household; and
  c. it is likely that the defendant or the defendant's associates know the family's current home address.

Code 3

- Applicants living in "Extremely Overcrowded" conditions in public housing who began living in those apartments prior to July 1, 1990. To qualify, applicants must live in apartments containing two or more distinct families. The Housing Authority will conduct a lottery to

determine the order in which these applicants will be called for eligibility interviews for this priority code. The term "Extremely Overcrowded" is defined in the definition of "substandard housing," at page 5 below.

Code 4

- Applicants doubled-up and living in "Overcrowded" conditions in public housing who began living in those apartments prior to July 1, 1990. To qualify, applicants must live in apartments containing two or more distinct families. The Housing Authority will conduct a lottery to determine the order in which these applicants will be called for eligibility interviews for this priority code. For the purposes of this Plan, "Overcrowded" shall be defined as an apartment with more than twice as many people as the number of bedrooms *(e.g.,* five (5) or more people in an apartment with two bedrooms).

Code 5

- Applicants living in extremely substandard dwellings, defined as apartments with outstanding Class C violations issued by HPD concerning plumbing, bathrooms, electricity, heat, hot water, exposure to rain or wind, rodents, gas, sewage, rubbish, lead paint or plaster. However, the applicants must not have caused the defective conditions.
- Applicants living in "Extremely Overcrowded" dwellings. However, the applicants must not have caused the overcrowding by, for example, taking in paying boarders.

Code 6

- Applicants paying more than 50% of family income for rent. These applicants must be the tenants of record of the apartment in which they reside.
- Applicants living in substandard housing.

Code 7

- Applicants living in "Overcrowded" dwellings. However, the applicants must not have caused the overcrowding by, for example, taking in paying boarders.
- Applicants living doubled-up in an apartment in which they are not the tenants of record.
- Applicant families with one or more persons suffering from an illness or disability living in housing that constitutes a health hardship to such persons due to their illness or disability.

Code 9

- Applicants living in standard housing and paying less than 50% of income for rent.

C. *Priority Codes and Federal Preferences*

Applicants in priority codes 0, 1, 5 and 6 are entitled to one of the three preferences for public housing set forth in federal statute and regulation: involuntarily displaced, living in substandard housing, or paying more than 50% of family income for rent. The Housing Authority uses the following definitions: "involuntarily displaced" is defined as it is in 24 C.F.R. § 960.211(d); "substandard housing" is housing that (1) is defined in 24 C.F.R. § 960.211(f) or (2) constitutes a direct threat

to life due to the illness or disability of a family member or (3) is "extremely overcrowded," defined as more than twice as many people as the number of living and bedrooms (for example five (5) or more people in one apartment with one living room and one bedroom; and "paying more than 50% of family income for rent" is defined as it is in 24 C.F.R. § 960.211(h)-(i).

Applicants in priority codes 2, 3, 4 and 7 are entitled to the Housing Authority's local preferences to the extent permitted by law. *See* 24 C.F.R. § 960.211(b)(2)(ii). Applicants in priority code 9 are not entitled to a federal or local preference.

IV. *INFORMATION AVAILABLE TO APPLICANTS*

A. *The Interviewer's Guide to Anticipated Vacancies*

Every two (2) weeks, the Occupancy Control Division of the Housing Applications Department ("OCD") will prepare an Interviewer's Guide to Anticipated Vacancies ("Interviewer's Guide"), listing all of the projects. The Interviewer's Guide will be organized by borough and will be divided into elderly and general population projects listed alphabetically by full name, with street intersections. The Interviewer's Guide will list the three apartment sizes in which applicants may select the project in which they wish to live: no bedrooms, one-bedroom, and two-bedrooms. Projects may be designated as anticipating vacancies in some, but not all, apartment sizes.

For each project not currently appearing on the Interviewer's Guide as anticipating vacancies, OCD will designate the project as anticipating vacancies in a given apartment size when it has on hand fewer certified applications than it needs to fill the vacancies anticipated dur-

ing the next six (6) months. Projects currently designated on the Interviewer's Guide will continue to be designated as anticipating vacancies until they have enough certified applications to fill vacancies anticipated during the next nine (9) months.

OCD shall determine the number of certified applications each project needs to fill anticipated vacancies for nine (9) months and for six (6) months by the following formula:

> For nine (9) months: three-quarters of the total of the preceding year's move-outs in each apartment size, multiplied by the number of certified applicants needed to complete one rental in the relevant apartment size, less the expected number of placements from the Command Center for Relocated Families (the "Command Center") in the relevant apartment size. These numbers shall be based upon an analysis of all placements during the previous year as contained in the monthly reports filed by each project manager.

For six (6) months: two thirds of the nine(9)-month total.

OCD shall review the data for each project once a year and adjust the factors in the formula as necessary to ensure that each project has an appropriate number of applications to meet anticipated vacancies.

B. *Dissemination of Information*

To assure that all applicants entitled to select a project have an equal opportunity to do so, the Housing Authority shall make available to all applicants, prior to their eligibility interview, a "project information book." The book shall include the location of all projects and, for each project, information about the nearest transporta-

tion, schools, hospitals, public services (such as child care and other services offered by the project's community centers) and any income restrictions. Where applicable, income restrictions shall be noted by apartment size. Information regarding the accessibility of buildings within projects to persons who are mobility-impaired and the existence of apartments accessible to persons with mobility impairments shall be added to the project information book within one year from the date this Plan is adopted. A copy of the current Interviewer's Guide will be inserted in each project information book. Data from the project information book shall also be posted on a map in the Applications Department waiting area.

The project information book shall be available for review at all Applications Department waiting rooms and satellite offices. The notice scheduling the eligibility interview shall advise applicants that they may review the project information book and the current Interviewer's Guide, and the locations at which they may be reviewed. Thus, by the time of the interview the applicant will have had the opportunity to review information needed to make an educated choice of project.

V. *QUALIFYING FOR PUBLIC HOUSING*

A. *Applicants to be Computer-Scheduled*

Except as provided in Paragraph V (B), below, applicants shall be computer scheduled for eligibility interviews as follows:

First, OCD shall (1) tabulate the number of vacancies, by apartment size, that each project anticipates within the next nine months; and (2) determine the number of additional certified applicants the project needs to fill these anticipated vacancies, using the monthly reports

filed by each project manager which list, by apartment size, the number of applications and transfer requests awaiting rental at the project as well as all vacancies and rentals.

Second, OCD shall determine the number of applicants to be interviewed for vacancies anticipated in each borough based upon these monthly reports, the number of certified applications each project needs to complete one rental, the percentage of applicants summoned to interviews who appear for the interview and the percentage of applicants who complete the eligibility requirements for public housing as well as the number of eligibility interviewers available to conduct interviews. Finally, a computer shall select applicants on a borough by borough basis based upon their borough of first choice, apartment size required, income tier, priority and date of application.

For the purposes of this Plan "Income Tier" shall be defined as the income level of each applicant which, to the extent permitted by federal law and regulations, the Housing Authority uses to advance its goal of economic integration and of avoiding concentrations of low-income families in any one or all of the Housing Authority projects.

The Housing Authority divides applicants into three Income Tiers: Applicants in Tier III have family incomes of between 50% and 80% of the area median income; applicants in Tier II have family incomes ranging from approximately the maximum assistance level of public assistance payments to 50% of area median income; applicants in Tier I have family incomes ranging from none up to approximately the level of maximum public assistance. The dollar amounts for each tier vary by family size and are revised periodically to reflect economic data and income levels for admission to public housing as established by federal guidelines.

B. *Applicants To Be Manually-Scheduled*

The following applicants may be manually-scheduled for eligibility interviews: Applicants in priority codes 0, 2, 3, 4 and 7 and outreach applicants, recruited pursuant to the Outreach Program described below.

C. *The Eligibility Interview/Project Selection*

Each applicant must appear for, and cooperate in, an eligibility interview conducted by the Applications Department pursuant to procedures set forth in the Housing Applications Manual. The manual shall be distributed to all eligibility interviewers, who shall be trained in its procedures. All eligibility interviewers will take a cultural diversity course, to sensitize them to racial, ethnic and other issues that arise in the course of their work. The Director of the Applications Department shall ensure that all eligibility interviewers are trained in the Department's procedures.

To ensure that each eligibility interviewer is following a standard interview format, the Applications Department shall use an interview form to record the information elicited by the interviewer from the applicant.

At the eligibility interview, the interviewer will first note information to determine the applicant's family composition. Applicants who are permitted to choose a project shall consist of those in the last three categories of Code 1, and Codes 5, 6, 7 and 9, whose family composition qualifies them for a "Smaller Apartment." For the purposes of this Plan, "Smaller Apartment" shall be defined as an apartment of two bedrooms or less. Applicants for such apartments shall be given the Interviewer's Guide and asked to select only one project designated on the Guide as requiring applicants in the apartment size required by the applicant, in one of the two boroughs they listed on their applications.

If the applicant can demonstrate "Changed Circumstances" between the application and interview dates, the applicant may select a project from a borough other than the two listed on the application. For the purposes of this Plan "Changed Circumstances," which must be demonstrated by documentation or other credible evidence, shall be limited to a job change which requires more than a ninety-minute commute from the original boroughs (or project) selected; or a medical, mental health or special education need of a family member which cannot be met anywhere except in a different borough (or project) than the one selected; or where adequate medical or special education services are not reasonably available in the original boroughs (or project) selected.

The interviewer shall record the applicant's project choice and complete the interview. If the applicant provides all of the required information and is found eligible for public housing, the application shall be certified to the selected project. For applicants certified under this Plan, the Housing Authority anticipates that certification to a project will mean a wait of six to nine months.

Applicants may defer their project choice for no more than thirty days. They may keep the copy of the Interviewer's Guide received at the interview. However, they must select a project designated as anticipating vacancies on the Interviewer's Guide received at the interview in either their first or second choice borough and in the appropriate apartment size. Such applicants may submit their project selection by mail.

If the Housing Authority requires additional information from an applicant before it can make a final determination as to eligibility, certification may be delayed only until the additional information is provided. The additional information may be submitted by mail.

If the applicant fails to provide the additional information or fails to choose a project, or rejects all projects designated on the Interviewer's Guide as anticipating vacancies in the appropriate apartment size, the application shall be deemed "Dead."

For the purposes of this Plan, "Dead Application" shall be defined as an application which may no longer be acted upon because the applicant has failed or refused to: (1) appear for an eligibility interview within six (6) months of the scheduled interview date; (2) submit required additional information within six (6) months of the date requested; (3) select a project from among those designated on the Interviewer's Guide as anticipating vacancies in the appropriate apartment size, when an applicant is permitted to select from that Guide, at the eligibility interview or within thirty (30) days of that interview; (4) accept two apartment offers from the Command Center, OCD or the project to which the applicant has been certified, unless a temporary emergency prevents a move at the time of the second offer; (5) respond within forty-five (45) days to notice from a project manager advising that an apartment is available; (6) respond within forty-five (45) days, to a letter inquiring as to whether a certified applicant is still interested in public housing; (7) accept an offer because the applicant believes the apartment is of an inappropriate size; or (8) has informed the Housing Authority that he or she is no longer interested in public housing.

An applicant whose application has been deemed dead shall receive written notification to that effect, indicating the reason for the action, and that notification shall be considered a final agency determination. Any such applicant who wishes to be considered for public housing must file a new application. Any new application shall be governed by its date of receipt and the applicant may not be selected for interview or certified to any pro-

ject for one year after the initial application was deemed dead. However, information contained in a dead application may be used to verify information contained in subsequent applications. Dead applications shall be filed in the Applications Department and retained for the period required by federal regulations.

D. *Applicants Who May Not Select Projects*

1. *Emergency Applicants*

Because their need for housing is urgent, applicants in priority codes 0, the first two categories of Code 1, and Codes 2, 3 and 4, may select the borough in which they wish to live, rather than a particular project. These applicants must select one of the two boroughs listed on their application, unless they can demonstrate "Changed Circumstances" between the application and project assignment dates. Such applicants who are eligible for public housing shall be certified to the Command Center, which will match each applicant to an actual vacancy in the borough selected by the applicant at the eligibility interview, without regard to any preference by the applicant for a particular project in that borough, except where the applicant is assigned to a particular project as part of the Applications Outreach Program, described below.

The Command Center shall log in all applications received and vacancies reported in date order and will match applicants to vacancies based upon priority and the receipt date of the application and report of a vacancy. Each applicant may reject one offer of an apartment without penalty. If an applicant rejects an offer, the applicant will maintain his or her place on the Command Center's list and shall be offered the next vacancy. If the second offer is rejected, the application shall be deemed "Dead" unless the applicant demonstrates that a tempo-

rary emergency prevents a move at the time of the second offer. The "City-Referred Emergency Applicants" shall be assigned proportionately to all of the Housing Authority's projects (except elderly projects, any project with minimum income requirements and the Section 8 new construction projects), based upon the total number of apartments in each project.

2. *Applicants for "Larger Apartments"*

Because turnover in the "Larger Apartments" is very low, making it difficult to anticipate vacancies, non-Command Center applicants who require "Larger Apartments" may select a borough in which they wish to live rather than a particular project. These applicants must select one of the two boroughs listed on their application, unless they can demonstrate "Changed Circumstances" between the application and the project assignment dates. For the purposes of this Plan, "Larger Apartments" shall be defined as an apartment of three bedrooms or more.

The applications of such applicants who are eligible for public housing shall be certified to OCD which will match each applicant to an actual vacancy in the borough selected at the applicant's eligibility interview without regard to any preference by the applicant for a particular project in that borough, except where the applicant is assigned to a particular project as part of the Applications Outreach Program, described below.

OCD shall maintain a list of these applicants organized by borough selected at the eligibility interview, apartment size "Income Tier," priority and date of certification. OCD shall log in all applications received and vacancies reported and will match applicants to vacancies based upon "Income Tier", priority and date of receipt of the application. Each applicant shall be permitted one rejection of an apartment. If an applicant

rejects an offer, the applicant shall maintain his or her place on OCD's list and will be offered the next vacancy. If the second offer is rejected, the application shall be deemed "Dead" unless the applicant demonstrates that a temporary emergency prevents a move at the time of the second offer.

E. *Disabled Applicants*

Applicants who are disabled may either select a project or borough in the same way as non-disabled applicants, or may request that their application be assigned to a special Housing Applications Department list. Applicants who select in the same way as non-disabled applicants reserve their rights to have a reasonable accommodation made for their disability. Applicants who request that their application be assigned to the special Housing Applications Department list may select, at their eligibility interview, either one or two boroughs indicated on their written application. The Housing Applications Department will then match each applicant to an actual vacancy in a specially-equipped apartment in the borough or boroughs selected by the applicant at the eligibility interview. Applicants who choose to have their applications assigned to the special Housing Applications Department list will not be required to wait an unreasonable length of time for an apartment solely on account of their disability. Applicants who demonstrate "Changed Circumstances" may select a borough other than the two listed on their application.

The Housing Applications Department will maintain a list of those disabled applicants who request specially-equipped apartments, organized by borough, apartment size, "Income Tier," priority and date of certification. The Housing Applications Department will log in all applications received and vacancies reported and will

match applicants to vacancies based upon "Income Tier," priority and date of receipt of the application. Each applicant will be permitted one rejection of an accessible apartment. If an applicant rejects an offer, the applicant will maintain his or her place on the Housing Applications Department list and will be offered the next vacancy. If the second offer is rejected, the application shall be deemed "Dead" unless the applicant demonstrates that a temporary emergency prevents a move at the time of the second offer.

VI. *TENANT TRANSFERS WITHIN PUBLIC HOUSING*

A. *The Transfer Process*

Housing Authority tenants shall be permitted to apply for a transfer from one apartment or project to another. To do so, they must submit a written request to the manager of the project at which they reside, on the form designated by the Housing Authority, showing the reason for the transfer request.

If the project manager denies the request, he or she shall notify the tenant in writing of the reason for denial. For intra-project transfer requests, if the project manager approves the request, he or she shall assign a priority code to it and place it on the project "Waiting List." For inter-project transfer requests, if the project manager approves such a request, he or she shall assign a priority code to it and send it to the District Director or designee for review.

If the District Director or designee denies the inter-project transfer request, he or she shall notify the tenant in writing of the reason for the denial. If the District Director or designee approves the transfer request, he or

she shall transmit the request to the Deputy Director of Management for that district.

If the Deputy Director denies the inter-project transfer request, he or she shall notify the tenant in writing of the reason for the denial. If the Deputy Director approves the request, the inter-project transfer process shall be effected.

B. ***Transfer Priorities***

Good causes for transfer, and their priority codes, are:

Code 0

Tenants who are:

- Displaced due to project renovation.
- Displaced because their apartment is needed for project use.
- Living in underoccupied apartments pursuant to Housing Authority standards (e.g., one person living in a two-bedroom apartment). If a tenant who is living in an underoccupied apartment refuses to request a transfer to an apartment within the tenant's current project or to another project, the Housing Authority shall offer that tenant any apartment of the appropriate size within the current project or another project.

The three categories of transferees described above may choose any project whether or not it is designated as anticipating vacancies on the Interviewer's Guide. After approval, these transfer requests shall be certified to the Command Center for assignment to the chosen project.

Code 1

Tenants who are:

- Victims of domestic violence or intimidated witnesses/victims.
- Suffering a rent hardship. (Applies only to projects with income restrictions including projects which are not defined as conventional public housing projects.)
- Victims of a traumatic incident in their project.

The three categories of transferees described above may choose only the borough to which they would like their request assigned. After approval, the transfer request shall be certified to the Command Center for assignment.

- Asking to return to a project from which they were displaced due to project renovation. (Tenants qualify for this transfer only if they request it within six months of the completion of the renovation which caused their displacement.)

The above category of transferees shall be certified to the Command Center for assignment to their original project.

- Related to a family member who dies in the apartment at which such tenant resides.

The above category of transferees may choose to transfer within their current project. If these transferees wish to leave their current project, or their current project cannot accommodate their need for a transfer, they may choose only the borough to which they would like their transfer request assigned. After approval, such transfer requests shall be certified to the Command Center for assignment.

Code 5

Tenants who are:

- "Extremely Overcrowded" based on the approved occupancy of the apartment.
- Involved in long-term friction between neighbors.

The two categories of transferees described above must choose their current project, unless the project contains no apartments of the size required, or an intra-project transfer will not resolve the friction, or it would likely take more than two years for an apartment of the appropriate size to become available. In these cases transferees who need "Larger Apartments" may choose only the borough in which they wish to live (these requests shall be certified to OCD); those who need "Smaller Apartments" may choose any project designated as anticipating vacancies on the Interviewer's Guide (these requests shall be certified to the selected project).

- In need of medical care not available within a reasonable distance of the project.

Transferees who show that the medical care is available only at a specific facility not within a reasonable distance, shall not be permitted to choose a project. Rather, the Housing Authority shall assign them to a project near that facility, whether or not the project is designated as anticipating vacancies on the Interviewer's Guide. When the medical care is not limited to a specific facility, transferees who need "Larger Apartments" may choose only the borough in which they wish to live (these requests shall be certified to OCD, which shall assign them to projects near the appropriate facilities); those who need "Smaller Apartments" may choose a project desig-

nated as anticipating vacancies on the Interviewer's Guide which is within a reasonable distance of a facility where the required care is available (these requests shall be certified to the selected project).

- Seriously ill and desire to continue critical care treatment with a doctor or hospital with which the tenants have a long-term relationship where travel to that doctor or hospital now imposes a hardship.

The above category of transferees shall not be permitted to choose a project. Rather, the Housing Authority shall assign them to a project near the doctor or hospital, whether or not the project is designated as anticipating vacancies on the Interviewer's Guide.

- In need of continuing home health care which no household member can provide and that is not available near the project.
- In need of continuing child care to enable a family member to work, which no household member can provide, and which is not available near the project.

Transferees who show that a relative will provide the health or child care shall not be permitted to choose a project. If the relative lives in a Housing Authority project, the Housing Authority shall assign the transferee to that project, whether or not it is designated as anticipating vacancies on the Interviewer's Guide. Otherwise, the Housing Authority shall assign the transferee to a project near that relative, whether or not the project is designated as anticipating vacancies on the Interviewer's Guide. Transferees who do not have relatives who will pro-

vide the required care and who need "Larger Apartments" may choose only the borough in which they wish to live (these requests shall be certified to OCD, which shall assign them to projects near appropriate providers or facilities); those who need "Smaller Apartments" may choose a project designated as anticipating vacancies on the Interviewer's Guide which is within a reasonable distance of appropriate providers or facilities (these requests shall be certified to the selected project).

- Disabled and need a specially-equipped or accessible apartment or building or a bigger or lower-floor apartment.

The above category of transferees may choose to transfer within their current project. If these transferees wish to leave their current project or their current project cannot accommodate their need for a transfer they may choose one or two boroughs to which they would like their transfer request assigned. After approval, such transfer requests shall be certified to OCD for assignment. Disabled tenants reserve their rights to have reasonable accommodations made for their disability.

Code 6

Tenants who are:

- "Overcrowded" based on the approved occupancy of the apartment.

Transferees who are "Overcrowded" must choose their current project unless the project contains no apartments of the size required, or it would likely take more than two years for an apartment of the appropriate size to become available. In these cases transferees who need "Larger Apartments" may

choose only the borough in which they wish to live (these requests shall be certified to OCD); those who need "Smaller Apartments" may choose any project designated as anticipating vacancies on the Interviewer's Guide (these requests shall be certified to the selected project).

- Required to travel more than 90 minutes due to a change in work location.
- Eligible for residence in an elderly project and who wish to move from a general population project to an elderly project.

Transferees in the two categories described above and who need a "Smaller Apartment" must choose from among projects designated as anticipating vacancies on the Interviewer's Guide. Those transferees who need a "Larger Apartment" may choose only the borough in which they wish to live. Those requests shall be certified to OCD.

Transferees who may choose a project designated as anticipating vacancies on the Interviewer's Guide will do so after their transfer request is approved. Those transferees must choose from the Interviewer's Guide in effect when the application is approved by the Deputy Director of Management who shall forward that Interviewer's Guide with the approval to the Project Manager. If such a transferee refuses all projects then designated as anticipating vacancies on the Interviewer's Guide, or fails to choose a project, the transfer request shall be deemed "Dead" and no new transfer request from that tenant shall be considered for one year unless a new request falls into Code 0 or 1 and states a different need for a transfer than the prior request.

All other transferees will make their project or borough choice when they submit their transfer requests

because their choice does not depend on the availability of vacancies.

VII. *RENTING TO APPLICANTS AT PROJECTS*

A. *Project "Waiting Lists"*

Project managers shall maintain separate "Waiting List" logs for each apartment size in the project. For the purposes of this Plan, "Waiting List" shall be defined as all of the applications and transfer requests awaiting rental at each project. All projects which consist of more than one building or group of buildings shall maintain a single "Waiting List" for each apartment size, unless the project includes some buildings, or portions of buildings, which are reserved for the elderly. Such projects shall maintain separate "Waiting Lists" for elderly and non-elderly applicants.

Upon receipt of a certified application (including an approved transfer request), the project manager shall enter the application (including data as to the applicant's "Income Tier," priority, date of certification, race/ethnicity and family size) onto the "Waiting List" log for that apartment size and (unless the application has been designated for an actual vacancy) shall file the application alphabetically.

Once an applicant (including a transferee) has been certified to a project, the applicant may not request another transfer or change his or her project choice, unless the applicant has been on a project's "Waiting List" for more than two years without having been offered an apartment, or demonstrates "Changed Circumstances" requiring a change in location.

After certification to a project, an applicant may refuse one offer of an apartment at that project. Upon the rejection, the applicant's place on the "Waiting List"

shall be maintained and the applicant shall be offered the next vacancy that develops. If the second offer is rejected, the application shall be deemed "Dead" unless the applicant demonstrates that a temporary emergency prevents a move at the time of the second offer.

All project managers shall be required to review their "Waiting Lists" once a year by contacting all applicants including inter-project transfers, but excluding intra-project transfers. The manager shall mail a letter by first class mail to each applicant to determine whether the applicant is still interested in public housing, whether there have been any changes in family composition affecting the required apartment size and whether there have been any changes in circumstances which might affect eligibility.

If the manager gets no response within three weeks after the mailing, the manager shall then attempt to contact the applicant by telephone. If after forty-five (45) days of the mailing, there is still no response, or if the applicant is no longer interested in public housing, those applications shall be deemed "Dead."

If it appears that the applicant may no longer be eligible for public housing or housing at that project, or if the applicant has been on the project "Waiting List" for more than two years and wishes to choose another project, or where there are "Changed Circumstances" under this Plan that may require reassignment to a new project, the project manager shall send the application to OCD which shall arrange a new eligibility interview and/or a new project choice, as required. When an applicant is reassigned to a new "Waiting List," the original date of certification shall control.

B. *Selecting Applicants for Rentals*

In selecting applicants for rentals, all applicants with preferences authorized by federal law and regulations (Codes 0-7), to the extent permitted by such laws and regulations, shall have priority over applicants with no statutory preferences (Code 9). Subject to this limitation, the project manager shall attempt to rent 25% of anticipated annual vacancies to applicants in "Income Tier" III; 37.5% of anticipated annual vacancies to applicants in "Income Tier" II; and 37.5% of anticipated annual vacancies to applicants in "Income Tier" I. The number of anticipated vacancies shall be equal to the number of vacancies occurring during the past calendar year. "Income Tier" shall supersede priority as a criterion in selecting applicants for vacancies, except for Command Center applicants, where priority shall supersede "Income Tier." To accomplish this goal, the manager shall fill vacancies in the following manner:

When a vacancy occurs, the project manager shall notify the Command Center. If the Command Center has an applicant for that apartment, it shall send the application to the project and the apartment shall be assigned to that applicant. If the Command Center has no applicant for the vacancy, the Command Center shall release the vacancy to the project manager, who shall offer it pursuant to the procedure outlined below. If the Command Center applicant declines the offer, the Command Center may release the vacancy to the project manager.

Vacancies released by the Command Center shall be offered as follows:

> The first vacancy shall be offered to the Tier III applicant whose application bears the highest priority and the oldest date of certification.

The second vacancy shall be offered to the Tier II applicant whose application bears the highest priority and the oldest date of certification.

The third vacancy shall be offered to the Tier I applicant whose application bears the highest priority and the oldest date of certification.

This sequence shall be repeated until 25% of the expected annual vacancies at each project have been filled with Tier III applicants, after which all subsequent vacancies shall be offered only to Tier I and Tier II applicants. Command Center applicants are to be included in determining when the "Income Tier" goals have been met, but intra-project transfers are not to be so included.

For "Smaller Apartment" vacancies released by the Command Center, project managers shall offer them to applicants on the project "Waiting List." For "Larger Apartment" vacancies released by the Command Center, project managers shall call OCD and compare the intra-project transfer requests on the project "Waiting List," if any, with the applications on OCD's list. The apartment shall be rented to the appropriate applicant, using the criteria of apartment size, "Income Tier," priority, and date of certification, in that order.

If there are no Tier III applicants on the project "Waiting List" or the OCD list when a vacancy for that tier develops, the vacancy shall be offered to a Tier II applicant. No vacancies will be held to await Tier III applicants nor will efforts be made to add Tier III applicants to the project "Waiting List" or the OCD list. Similarly, if there are no Tier II applicants on the project "Waiting List" or the OCD list when a vacancy for that tier develops, the vacancy shall be offered to a Tier I applicant. No vacancies will be held to await Tier II applicants nor

will efforts be made to add Tier II applicants to the project "Waiting List" or to the OCD list.

If, during the rental interview, the project manager has reason to believe that the applicant may not be eligible for public housing, the project manager may terminate the rental interview and return the application, with the approval of the District Director or designee, to Housing Applications for further review. The Housing Authority shall notify the applicant in writing that his or her application has been returned to the Housing Applications Department for further review, at which time the circumstances causing that review will be discussed with the applicant and confirmed in writing promptly thereafter.

VIII. *OUTREACH PROGRAMS*

A. *Project Outreach Plan*

If a project manager has no applications at all for a given "Smaller Apartment," or has an actual vacancy that all certified applicants for that apartment size have refused, the manager shall ask the District Supervisor for permission to borrow applications from a nearby project. If the District Supervisor approves, the District Supervisor shall contact OCD.

If OCD determines that borrowing applications from a nearby project is likely to solve the project's need for applications, it shall select the nearest project that has a sufficient number of applications for that size apartment. However, if the borrowing project's tenant body is more than 30% white, OCD shall not select a project whose tenant body is also more than 30% white.

Following OCD approval, the borrowing manager shall obtain from the nearby project a list of all applicants certified to the project who qualify for the apart-

ment size for which applications are needed. The borrowing manager shall mail a canvass letter to all the applicants on that list advising them that they may elect to have their applications transferred to that project, and that if they respond promptly, they may be housed sooner than if their applications were to remain at the project to which they are now certified. The letter shall explain that applicants may have their applications remain at the original project without penalty. If there are no apartments for the mobility-impaired, the letter shall so state.

The borrowing manager shall enter transferred applications on the project "Waiting List" in the order that applicants respond to the canvass letter. The borrowing manager shall borrow only enough applications to fill all existing vacancies and one additional vacancy. In no case shall more than half the applications for a particular apartment size on the nearby project "Waiting List" be borrowed.

If OCD determines that no nearby project has a sufficient supply of applications, the District Supervisor shall request that the project be included in the Applications Outreach Plan.

B. *Applications Outreach Plan*

When a project has failed to attract sufficient applicants by means of Project Outreach, or cannot use Project Outreach because no nearby project has a sufficient number of applications on its "Waiting List," the District Supervisor shall request that the project be included in the Applications Outreach Plan. Additionally, if the Department of Housing Applications determines that borrowing is not likely to solve the project's need for applications or that the project has, or within the next six months is likely to have, several unfilled vacancies, the

Department of Housing Application. may request that the project be included in the Applications Outreach Plan.

With the approval of the Directors of Management and Housing Applications, an applications outreach plan shall be initiated, as follows: Housing Applications shall poll its computer data base (excluding "Dead" applications) using the same criteria as in selecting applicants for eligibility interviews to locate applicants of the appropriate family size (and applicable income level in those projects with income restrictions), from among all applicants who, on their applications, selected the borough in which the outreach project is located. The number of applicants selected shall be based upon the number of applications needed by the outreach project(s) to fill existing vacancies and to develop a six(6)-month "Waiting List."

Applicants identified in this manner shall be notified by mail that the Housing Authority has or anticipates near-term vacancies at the outreach project(s). The letter shall inform applicants that the Housing Authority will interview them for eligibility sooner than if they waited to be selected for an eligibility interview based upon the criteria described above, if they are willing to limit their project choice(s) only to the outreach project(s). If there are no apartments at the project(s) accessible to the mobility-impaired, the letter shall so state.

Applicants who return the canvass letter agreeing to waive any right to select any projects not included in the Applications Outreach Plan, as of the date of the eligibility interview, shall be scheduled for eligibility interviews in the order in which their responses are received. Upon being found eligible, such applicants shall be certified to the outreach project(s) and shall be processed as are all other applications on the project "Waiting List."

Applicants interviewed for the Applications Outreach Plan who refuse certification to the outreach project(s) shall have their applications returned to files to await an interview based upon the criteria described above.

IX. *TENANTING NEW PROJECTS*

Projects under construction shall be designated on the Interviewer's Guide as anticipating vacancies approximately six months prior to their scheduled opening date. In addition, prior to opening, new projects may be included in the Applications Outreach Plan set forth in Section VIII B above. After opening, projects shall be tenanted in accordance with the provisions of this Plan.

X. *RECORDKEEPING*

Project managers shall maintain "Waiting List" logs listing all applicants certified for rental. In projects where apartments are designated for the elderly, the manager shall maintain a separate log for those apartments. The logs shall contain the following information for each applicant: name, application number, date of receipt, "Income Tier," priority, family composition/apartment size, status (applicant, transferee, or outreach applicant), race/ethnicity, and need for a handicapped-accessible apartment. The logs shall also list the disposition of the application including, as appropriate, date of apartment offer(s), result(s) of offer(s)—apartment number offered, move-in or refusal date(s), refusal reason(s), return to files, and reason for the disposition.

Data on apartment rentals shall be automatically added to the Housing Authority's computer data base.

XI. *MONITORING PLAN PERFORMANCE*

Representatives of the Office of Audit and Program Analysis shall visit each project not less than once a year

to review both the turnover logs and the "Waiting List" logs to make certain that the tenant selection and assignment procedures set forth in this Plan are being followed and are working efficiently. Based upon the visit, Audit and Program Analysis shall prepare a report, which analyzes performance at each project as well as the overall efficiency of the Plan. Any irregularities in following the procedures set forth in the TSAP shall be noted in this report and shall be brought to the attention of the Management, Applications and Law Departments.

U.S.C. Const. Amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1437d(c)(4)(A)(iv) (1994)

[T]he public housing agency shall comply with such procedures and requirements as the Secretary may prescribe to assure that sound management practices will be followed in the operation of the project, including requirements pertaining to—

(A) except for projects or portions of projects designated for occupancy pursuant to section 1437e(a) of this title with respect to which the Secretary has determined that application of this subparagraph would result in excessive delays in meeting the housing need of such families, the establishment of tenant selection criteria which—

* * * * *

(iv) are designed to ensure that, to the maximum extent feasible, the projects of an agency will include families with a broad range of incomes and will avoid concentrations of low-income and deprived families with serious social problems.

42 U.S.C. § 1437n(b)(2) (1994)

Not more than 25 percent of the dwelling units in any project of any agency shall be available for occupancy by low-income families other than very low-income families. The limitation shall not apply in the case of any project in which, before November 28, 1990, such low-income families occupy more than 25 percent of the dwelling units.

Balanced Budget Downpayment Act, I, Pub. L. No. 104-99, § 402(d)(1), 110 Stat. 26, 41 (1996)

Repeal of Federal Preferences—

(1) Public housing—Section 6(c)(4)(A) of the United States Housing Act of 1937 (42 U.S.C. 1437d(c)(4)(A)) is amended to read as follows:

"(A) the establishment, after public notice and an opportunity for public comment, of a written system of preferences for admission to public housing, if any, that is not inconsistent with the comprehensive housing affordability strategy under title I of the Cranston-Gonzalez National Affordable Housing Act;".

Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, §§ 502(a)(3), 502(a)(5)(C), and 502(a)(5)(D), 112 Stat. 2518, 2520-21 (1998).

FINDINGS—Congress finds that—

* * * * *

(3) despite serving this critical function, the public housing system is plagued by a series of problems, including the concentration of very poor people in very poor neighborhoods and disincentives for economic self-sufficiency;

* * * * *

(5) the interests of low-income persons, and the public interest, will best be served by a reformed public housing program that—

* * * * *

(C) vests in public housing agencies that perform well the maximum feasible authority, discretion, and control with appropriate accountability to public housing residents, localities, and the general public; and

(D) rewards employment and economic self-sufficiency of public housing residents.

42 U.S.C. § 1437(a)(1)(C) (Supp. 1999)

Declaration of policy

It is the policy of the United States—

* * * * *

(C) consistent with the objectives of this subchapter, to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public[.]

42 U.S.C. § 1437a(a)(2)(D) (Supp. 1999)

Encouragement of self-sufficiency

The rental policy developed by each public housing agency shall encourage and reward employment and economic self-sufficiency.

42 U.S.C. §§ 1437n(a)(1), 1437n(a)(3)(A), and 1437n(a)(3)(B)(i) (Supp. 1999)

Income eligibility for public housing.

(1) Income mix within projects. A public housing agency may establish and untilize income-mix criteria for the selection of residents for dwelling units in public housing projects, subject to the requirements of this section.

* * * * *

(3) Prohibition of concentration of low-income families.

(A) Prohibition. A public housing agency may not, in complying with the requirements under paragraph (2), concentrate very low-income families (or other families with relatively low incomes) in public housing dwelling units in certain public housing projects or certain buildings within projects. The Secretary shall review the income and occupancy characteristics of the public housing projects and the buildings of such projects of such agencies to ensure compliance with the provisions of this paragraph and paragraph (2).

(B) Deconcentration. A public housing agency shall submit with its annual public housing agency plan under section 5A an admissions policy designed to provide for deconcentration of poverty and income-mixing by bringing higher income tenants into lower income projects and lower income tenants into higher income projects. This clause may not be construed to impose or require any specific income or racial quotas for any project or projects.

42 U.S.C. § 3604(a) (2001)

Discrimination in the sale or rental of housing and other prohibited practices.

As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

24 C.F.R. § 913.104(a) (1992)

General. Section 16(a) of the U.S. Housing Act of 1937 (42 U.S.C. 1437n) ("The 1937 Act") provides that not more than 25 percent of the dwelling units that were available for occupancy under public housing Annual Contributions Contracts and Section 8 Housing Assistance Payments ("HAP") Contracts taking effect before October 1, 1981 and that are leased on or after that date shall be available for leasing by Lower Income Families other than Very Low-Income Families. HUD reserves the right to limit the admission of Lower Income Families other than Very Low-Income Families to these units.

24 C.F.R. § 960.211(a)(1) (1992)

In selecting applicants for admission to its projects, each PHA must give preference to applicants who are otherwise eligible for assistance and who, at the time they are seeking housing assistance, are involuntarily displaced, living in substandard housing, or paying more than 50 percent of family income for rent.

24 C.F.R. § 960.205(a) (2001)

The tenant selection criteria to be established and information to be considered shall be reasonably related to individual attributes and behavior of an applicant and shall not be related to those which may be imputed to a particular group or category of persons of which an applicant may be a member. The PHA may use preferences based on the employment status of family members.

24 C.F.R. § 960.206(b)(2) (2001)

Preference for working families. The PHA may adopt a preference for admission of working families (families

where the head, spouse, or sole members, is employed). However, an applicant must be given the benefit of the working family preference if the head and spouse, or sole member is age 62 or older, or is a person with disabilities.

59 Fed. Reg. 36616, 36618-19 (July 18, 1994)

B. Preference for Working Families

Public comments addressed the question of a preference for working families in several respects. One comment requested that HUD clarify whether a local preference can be given for working families, designed to achieve a broad range of incomes, to permit admission of a higher income working family before a lower income non-working family whose place on the waiting list is higher. Other comments were received on the proposed language of § 960.205 permitting a preference based on a family's employment status. One housing agency and two organizations of housing agencies expressed approval of the change, and a legal services organization expressed disapproval of this change.

The Department is convinced that housing agencies must have the flexibility to give preference to working families to assure diversity in the residency of projects and to include families who can serve as role models for other families. Consequently, the final rule preserves the removal of the current rule's prohibition on using employment as a selection criterion.

Moreover, an HA is free to adopt a preference for working families as a "local preference" for admission of families who do not qualify for a "federal preference", as well as to use such a criterion as a "ranking preference", to be used to select among applicants who do qualify for a "federal preference." Housing owners also may use this criterion as a "ranking preference", and as a "local preference" [*36619] if it is included in the local preference system adopted by the relevant HA for the Section 8 Certificate and Voucher programs.

There are, however, two limits on the use of a preference for working families. First, the preference may

not be administered in a way that will violate the legal prohibitions against discrimination. Second, the preference may not be used in a way that will violate the legal prohibition contained in section 16 of the United States Housing Act of 1937 *(42 U.S.C. 1437n)* against selecting a higher income applicant before a lower income applicant who is higher on the waiting list.

Both of these limits are expressed in an example of the use of a ranking preference in the rule: this type of preference may be used so long as the prohibition against selection of higher income families and the nondiscrimination provisions that protect against discrimination on the basis of age or disability are not violated. If such a preference is used, it may not give greater weight to an applicant based on the amount of employment income, and an applicant household shall be given the benefit of the preference if the head and spouse, or sole member, are age 62 or older, or are receiving social security disability or supplemental security income disability benefits, or any other payments based on an individual's inability to work. The owner also could give preference to graduates of, as well as active participants in, educational and training programs that are designed to prepare individuals for the job market.

When used as a "local preference" instead of as a "ranking preference," the concern about selection of a higher income applicant is not a limitation if it is being used in the public housing program or the Indian housing program. In these programs, a local preference for working families, designed to achieve a broad range of incomes, may be used to admit a higher income working family over a lower income non-working family whose place on the waiting list is higher.

The distinction between programs is made because of specific language found in section 16 with respect to public housing that exempts such projects when "local

preferences" are being used (to attain a broad range of incomes, presumably), and because the section 16 restriction does not apply to Indian housing. The nondiscrimination limitation does continue to apply when such a preference is applied as a local preference. It should be noted that section 16's exception for IHAs permits them to use income ranges as a local preference, ranking preference, or both.

Housing agencies are not the only entities that may avail themselves of a preference for working families. Private owners may also adopt such a preference as a ranking preference-with both limits described above applicable to them.